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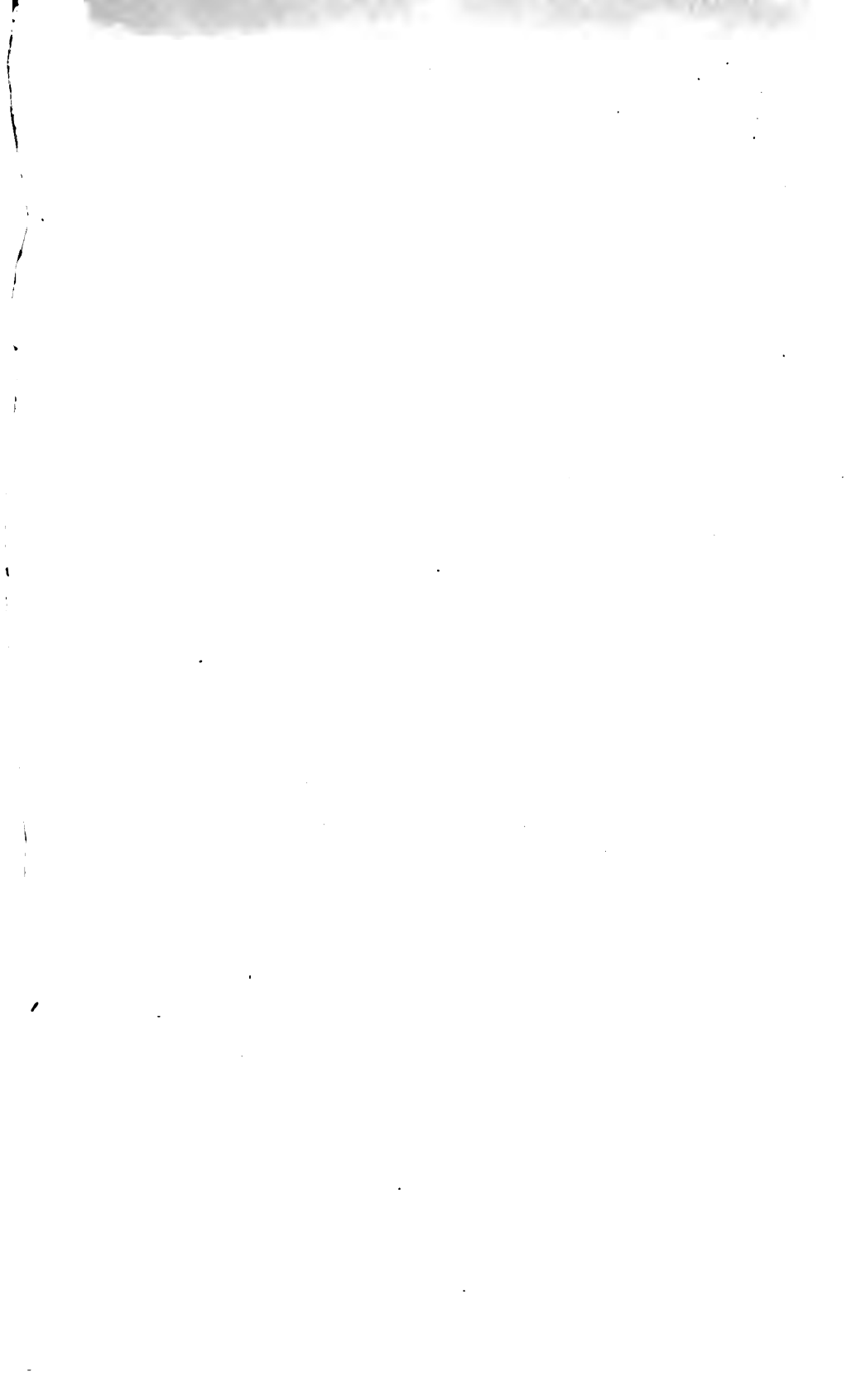
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

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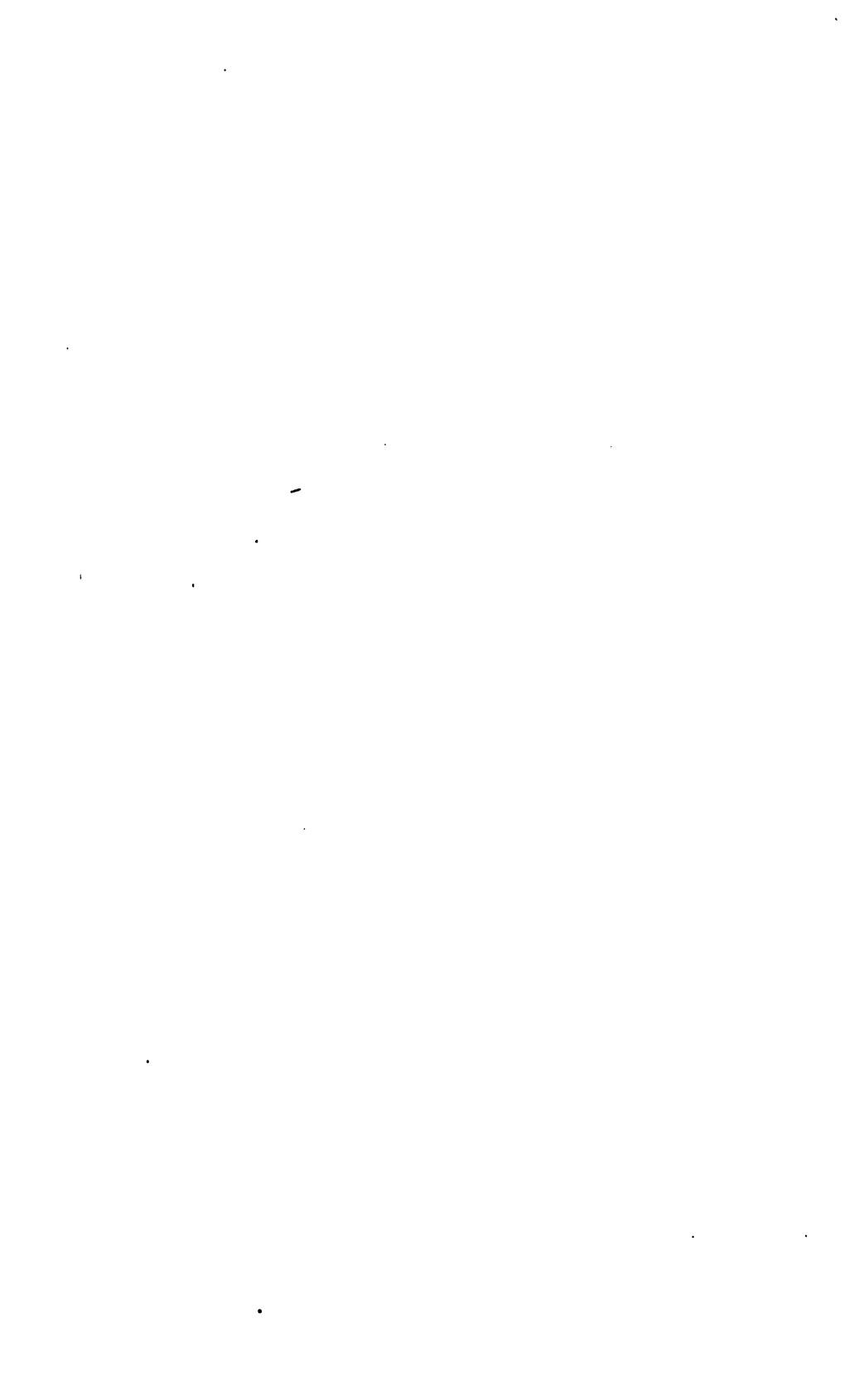
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CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS
 AND IN THE
EXCHEQUER CHAMBER,

Trinity Vacation,

IN THE

Hillaspie

TWENTY-FIFTH AND TWENTY-SIXTH YEARS OF THE
 REIGN OF VICTORIA. 1863.

MEMORANDA.

THE Right Hon. Sir Cresswell Cresswell, Knt., the first Judge Ordinary of the Probate and Divorce Courts (formerly one of the judges of the Court of Common Pleas), died on the evening of Wednesday, the 29th of July, 1863, at his residence, Prince's Gate, Knightsbridge. His death was accelerated by an accidental collision whilst riding home from court a few days previously.

On the 3d of September, 1863, the Hon. Sir James Plaisted Wilde, one of the Barons of the Court of *Exchequer, took the oaths on his appointment as Judge Ordinary of the Probate and Divorce Courts, in the room of The Right Hon. Sir Cresswell Cresswell, Knt., deceased. [*2]

On the 3d of October, 1863, Mr. Serjt. Pigott took the oaths on his appointment as one of the Barons of Her Majesty's Court of Exchequer, in the room of Mr. Baron Wilde, promoted to the office of Judge Ordinary of the Probate and Divorce Courts.

On the same day Sir William Atherton, Her Majesty's Attorney-General, resigned his office.

Sir Roundell Palmer, Knt., Her Majesty's Solicitor-General, was thereupon promoted to the office of Attorney-General: and Robert Porrett Collier, Esq., one of Her Majesty's Counsel learned in the Law, was appointed Her Majesty's Solicitor-General.

In the course of this vacation, William Henry Cooke, Esq., of the Inner Temple, John Gray, Esq., of the Middle Temple, John Joseph Powell, Esq., of the Middle Temple, and George Lock, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the Law.

*3] *JOHN HOWELLS, Appellant; THOMAS WYNNE, Inspector of Mines, Respondent. *June 22.*

By a special rule for the regulation of coal-mines under the 23 & 24 Vict. c. 151, the banksman is directed to "take care that the persons descending or ascending the pit shall in no case exceed the number of eight men and boys." A breach of these rules is by s. 22 punishable on summary conviction by fine and imprisonment.

A., the charter-master of a pit (who by the rules is declared to be "the responsible manager of the pit under his charge"), was close to the pit, and was cognisant that more than eight men were being lowered down at one time, and had power to prevent the banksman (who is his servant) from so doing, and did not interfere:—

Held, that A. was properly convicted of a breach of the regulations, as being a person "aiding, abetting, or procuring the commission of the offence," within the 11 & 12 Vict. c. 43, s. 5.

THIS was an appeal against a decision of justices, pursuant to the 20 & 21 Vict. c. 43.

The appellant is the charter-master at the Dark Lane Coal Pits, on the Priors Lee colliery, in the county of Salop, and appeared before the justices on the 24th of March, 1863, in obedience to a summons issued upon an information laid by Thomas Wynne, Her Majesty's inspector of coal-mines for the county of Salop, which information charged that Richard Richards, late of Priors Lee, in the parish of Shiffnal, in the said county, on the 29th of December, 1862, at the parish of Shiffnal, in the said division and county, being then and there the banksman of a certain coal-pit there situate, called the Dark Lane Pit, belonging to the Priors Lee colliery, did then and there permit and suffer more than eight persons to descend the said pit at one time, to wit, that he did then and there allow twelve persons to descend the said pit at one time, contrary to the 24th special rule then in force for the regulation of the said colliery, established in pursuance of the 23 & 24 Vict. c. 151, and that one John Howells (the appellant), late of Priors Lee aforesaid, being then and there the charter-master of the said pit, was then and there present, and did then and there aid and abet the said Richard Richards to do and commit the offence aforesaid, contrary to the statute in such case made and provided.

The following is an extract from the special rules to be observed in the Shropshire collieries, made in pursuance of the 23 & 24 Vict. c. 151:—

*4] "15. The charter-master shall be the responsible manager of the pit under his charge, or, in his absence, the underlooker or fireman: and, if the charter-master shall have occasion to absent himself from the pit, he shall give previous notice to such underlooker or fireman.

"24. Every banksman or hooker-on is to give the proper notice or signal to the engine-man to lower or raise the cages or baskets of coal, and any person going down or up the pit: and he shall take care that the persons ascending or descending the pit shall in no case ex-

ceed in number eight men and boys; and he shall forthwith give notice to the charter-master, underlooker, or manager, of any person who may disregard his directions."

On the 29th of December last, twelve men were killed at the pit in question by the breaking of a certain apparatus used to attach the cage (in which the men descend to their work) to the wire rope.

A man named Richard Richards was the banksman at the pit on the morning in question. He allowed twelve men to get into the cage, and gave the signal to the engine-man to lower them. They had only proceeded a few yards when the apparatus broke, and the men were precipitated to the bottom, a depth of 270 yards, and killed on the spot.

An information was afterwards laid by Mr. Wynne against Richards for breach of the 24th rule above set out, to which he pleaded guilty, and was sentenced by the justices before whom the case was heard to two months' imprisonment, with hard labour.

Upon the hearing of the information against the present defendant the following evidence was given:—

Thomas Wynne. "I am inspector of mines for this district. produce a certified copy of the rules applicable to all collieries in Shropshire. The pit at which *the accident happened whereby twelve men and boys were killed on the 29th of December last, [*5 is in Shropshire. The rules are applicable to that pit."

Noah Chirms. "I am a collier. I recollect the morning of the accident in Dark Lane Pit on the 29th December last year. I got to the pit at 5.25 a. m. I could not see how many people were there. When I got there, there were some; I cannot say how many; there might be a dozen or so. I saw Richards there: he was the banksman. I saw the defendant there when I arrived: he is the charter-master. We were all on the bank together. I recollect the first lot of men going down. I was one of them: it went down some time about 5.30. The defendant stood by the cabin door. The cabin is eight or nine yards from the pit. I got to the pit five minutes before the engine started. The cabin is almost close to the pit: it is not a large place. I cannot tell how many men it would hold. Howells was outside the cabin door when I got to the pit. I got into the cage with the first band. The defendant was between the cabin and the pit when the band started. We passed Howells as we got into the cage. I was one of the last that got into the cage. Twelve of us were in the cage. We went down safely. We all came up after the accident occurred."

Cross-examined. "It was dark, but there were lights on the bank from the rodneys. Richards was the banksman. I cannot say if any one else was on the pit bank. Corbett was there. I do not recollect him putting the bar in. Richards put the bar in the end I was in: some one put it in the other end. It was not dark; but I was not looking at the other end. I did not see what became of the defendant. I did not see him at the pit-mouth doing anything after I passed him in going to the cage. I cannot say how far he was from the door of the cabin: three yards. *I did not see Parton or Whateley there. [*6 It is a round cabin. The door of the cabin opens a little on one side of the pit: standing in front of the pit would be on the left-

hand side, and formed a sort of angle to the door. I have often been in the cabin. Any one in the cabin and standing in the centre would see the door."

Re-examined. "It was light enough to see what was going on. There were two fires on the bank. The cabin door opens inside. If I were standing in the cabin, with my face towards the pit, I should be on the left side of the cabin. The cabin door is on the left side. If I were standing in the centre of the cabin, with my face towards the shaft, the door would be on the left side. The cabin door was open when I left it. It did not take me more than half a minute to get from the cabin to the cage."

Thomas Corbett. "I am a wheelwright, and work at the Lilleshall Company's colliery. I remember the morning of the 29th of December. I was at the pit. I got there about 5.50 a. m. I got there before the first band went down. Noah Chirms, his father, Richards, and defendant were there. Dabbs was there also. We had to wait seven or eight minutes before the first band went down. I do not know how many went down in it: there were a good lot: the cage was full. I put one bar in the cage. Richards put the other bar. Richards gave me one to put in, and he put the other in. The defendant was in the cabin: he came out before the band went down: he did not come out again when I put the bar in. I cannot say he saw me put the bar in. I saw Howells when I was going to take the bar from Richards: he was coming from the cabin door towards the pit. I did not put the bar in till the people were in. I did not see Howells come out of the cabin *v] before the band started. *I was examined before the coroner on oath, and swore then that Howells stood by me when the first band went down. It is true that defendant stood by me when the first band went down. All I have sworn is right."

Cross-examined. "It was a dark morning."

Re-examined. "I did not count the men in the band. I can count twelve. I am in the employ of the defendant, not of the company. I am the defendant's servant. I came with the defendant here to-day. The defendant asked me to come: he did not tell me what he wanted me to come for: his brother asked me to come. The defendant was not present. I came with the defendant in a trap: his brother drove. I did not sit by the defendant. I did not talk to him coming along. I cannot tell what time I got to Wellington this morning. I have had some conversation with Mr. Bartlett (Howells's attorney) as to the evidence I was to give to-day. I saw him this morning."

The evidence for the defence was as follows:—

Isaac Whateley. "I am a collier, and am in the employ of Howells. I work at the pit in question. I was working there on the 29th of December. I remember the accident. On that morning I got to the pit about 5.35 a. m. When I went first to the pit, some of the men had gone down in the first band. I went into the cabin, and put my cap on. Howells was in the cabin when I came up. Parton went into the cabin when I went in. I was there when the accident happened. I did nothing; I sat down in the cabin. Spoke to Howells: we were speaking about the coal. Howells did not go out of the cabin while I was there: he was in the cabin when the accident occurred: he was on the left side, and I was on the right. From where he stood in the

cabin, he could not have seen *the pit's mouth. It was a dark [*S morning: we had the rodneys out."

John Parton. "I recollect seeing the defendant in the cabin. When I went in, he was talking about the coal. I cannot say who went in first, me or Whateley: we both went in the same time/as near as I can recollect. Howells could not see the pit from where he was standing. I can't tell what the people were doing when I went in. The cage came up for the second band soon after I went in. I was not there when the first band went down."

Joseph Dabbs. "I am banksman at one of the pits in question. I remember the morning of the accident. I came about 5 o'clock. I remember the first band of men going down. I was standing by my cabin door: the two cabins adjoin one another. Howells came out of the cabin and saw Corbett: he turned into the cabin again, and there he remained till the first and second bands had gone down. Corbett assists to send the men down when he is there. Howells could not see the cage lowered. The cage was not drawn up when Howells went out of the cabin. As soon as he saw Corbett, he went into the cabin again. I saw Parton and Whateley go into the cabin: that was before the accident, and after the first band went down."

Cross-examined. "My pit is about ten yards from defendant's, and is on the same bank. The same engine works both pits. That cage is at the bottom at night. I got to the pit at 5 o'clock. I have a cabin as well as the defendant. It is not usual to let more than eight go down. I have known twelve to go down. The men are not long going down. Four bands will take my men down. Both cabins are round. There is a blacksmith's shop between them: the shop is between my door and the defendant's door. *Chirms went down in the first band. I saw him get in. Howells was in the cabin. Chirms [*Q was nearer Howells than I was. I saw Corbett put the bar in. It is an untruth if Chirms and Corbett swore the defendant was on the bank when the first band went down. I was standing by my cabin door. There were a many people about the cabin. I saw Howells turn into the cabin. I kept my eye on the door; and he did not come out till the second band had gone down. The band went down Howells's pit, and then down mine. When the band went down my pit, I went to the catches to attend to them. I draw the catches myself. While I was doing so, I could see the defendant's cabin. I could attend to my duty and watch what defendant was doing at the same time. I had my eye on the defendant's pit; my pit and the cabin at the same time. I can attend to the defendant's pit as well as mine. I could see what he was doing at his pit, and at the same time attend to let my men down. I always look at the defendant's cabin door. I watch that cabin door every morning. I will not swear I did not let more than eight men down that morning."

Charles Owen. "I remember the 29th of December. I went to the bank when the first band was just up, and got in. I did not see Howells that morning. I got into the first band. If Howells had been there, I must have seen him. I looked round, but never saw him. I will swear he was not near the top of the pit."

Cross-examined. "I went down with the first band. I did not know how many were in till I came up again. The cage was not

very full: they were most boys: there were above eight people. The band was waiting when I got up. I ran and jumped in. Corbett was *10] waiting to put the bar in. When I passed Corbett, *he had the bar in his hand. I was at Richards's end. I was in a great hurry to get down. I always liked to get down first. I was late, and had to run for it. I live about three-quarters of a mile from the pit. I ran from the bottom of the bank. I did not run as hard as I could: I did run. I did not take any notice if there were many people on the bank. I cannot tell any one that was on the bank, or who went down with me."

Alexander Jones. "I am managing agent to the Lilleshall Company. I know the two cabins. If a person was standing at the door of one cabin, he could see a person going in the other cabin."

Cross-examined. "The banksman could not keep his eye on the defendant's cabin and attend to his own duties at the same time. After he had sent down the band, he could look straight there. At the same time he was sending the band down his own pit, if he were attending to his duty he could not see what Howells was doing: he could not see two ways at one time."

At the close of the evidence for the complainant, the defendant's attorney contended that the 24th rule did not make the charter-master liable for the neglect of the banksman; that there was no evidence that the defendant was aiding and abetting; and that, in order to justify a conviction, it should have been shown that he had done some act or uttered some expression to identify him with the unlawful act Richards was doing.

The evidence satisfied the justices that the defendant was close to the pit; that he was cognisant that more than eight men were being lowered down at one time; and that, under the 15th rule, he was the person in charge of the pit, and had the power to prevent Richards (who was his servant) lowering the men down: and they therefore *11] convicted him under the *above information, and ordered him to be imprisoned for two calendar months, with hard labour.

The question for the opinion of the court was, whether the evidence above set out was sufficient to justify the conviction.

Hayes, Serjt., for the appellant, upon the case being called on, objected that the respondent was not entitled to be heard, inasmuch as he had not complied with the rule of court as to the delivery of his paper-books to the two junior puisne judges, the appellant having upon his default duly delivered the whole of them.(a)

Welsby, for the respondent,—the argument having been adjourned

(a) The 16th rule of Hilary Term, 1853, 13 C. B. 6 (E. O. L. R. vol. 76), provides that "four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer-book, special case, special verdict, or appeal case, with the points intended to be insisted on, to the Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior puisne judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority: and, in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies or deposited with the master a sufficient sum to pay for such copies." And by rule of Michaelmas Term, 1857, 3 C. B. N. S. 141 (E. C. L. R. vol. 91), it is ordered that in "cases of appeal to a superior court under the provisions of the statute 20 & 21 Vict. c. 43, the 15th and 16th rules of Hilary Term, 1853, so far as the same are applicable, shall be observed."

for the purpose,—produced an affidavit that the respondent's attorney had in due time delivered the paper-books which by the practice of the *court he was bound to deliver, to the judges' clerks in their own room at Westminster. [WILLIAMS, J.—No doubt you delivered your copies in due time. But the question is, whether they were delivered at the proper place. That, I apprehend, is the judges' Chambers.] The object being that the judges shall have the paper-books, it is clearly enough if they are delivered to the clerks at Westminster Hall. [BYLES, J.—There is a record kept of what is done at Chambers: but, if the paper-books are delivered to the clerks at Westminster, it rests upon mere recollection. WILLES, J.—There must be a place of search to see if the rule has been complied with: and where else can that be but the judges' Chambers?] It may perhaps be reasonable to create a practice for the future. The rule of court makes no mention of the place at which the paper-books are to be delivered.

WILLIAMS, J.—The respondent's attorney has clearly adopted an erroneous course. Our officers inform us that the proper place for the delivery of paper-books, is the Chambers in Rolls Gardens. It has been truly said that no mention is made in the rule as to where the delivery is to take place: nor is there any other direction therein than that the plaintiff shall deliver the paper-books to the Lord Chief Justice and the senior puisne judge, and the defendant to the two junior puisne judges,—not to their clerks. If the rule were to be complied with literally, the paper-books might be delivered at the judges' houses, or to the judges whilst riding or walking along the streets. That would be manifestly absurd. There must be a usual place for their delivery, where the opposite party may search whether the rule has been complied with or not, in order that he may supply the defect. The respondent's attorney being clearly in default, the *appellant's attorney was justified in incurring the expense of delivering the additional paper-books, and must be reimbursed. [*13]

WILLES, J.—I do not think the rule of court is so defective as Mr. Welsby suggests. The only proper place for the delivery of the paper-books, is the judges' Chambers.

BYLES, J.—If this were not so, it would make it necessary for the attorney to search at two places, when there is only one place at which any official record of the transaction is kept.

Welsby undertaking that the copies should be paid for, the argument was allowed to proceed.

Hayes, Serjt., for the appellant.—The offence with which the appellant is charged is created by the 11 & 12 Vict. c. 43, s. 5, which enacts that "every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall by law be liable to," &c.: and the charge is, not that the appellant "counselled and procured," but that he was present "aiding and abetting" the principal offender in the commission of the offence, which makes him a principal in the second degree. The 11th section of the

Mines Regulation Act, 23 & 24 Vict. c. 151, provides for the establishment of special rules for the guidance of persons acting in the management of mines, and of persons employed therein: and the 22d *14] section enacts that every *person (other than the owner or principal agent or viewer) "employed in or about a coal-mine, colliery, or iron-stone mine, who neglects or wilfully violates any of the special rules established for such coal-mine, colliery or ironstone mine, shall for every such offence be liable, upon a summary conviction for the same before two justices of the peace, &c., to a penalty not exceeding 2*l*., or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any period not exceeding three calendar months." The offence here charged was committed by Richards the banksman, as to whose duties there are various regulations in the special rules besides the 24th. [BYLES, J.—The question is, whether the appellant, who was the superior of Richards, is not responsible for the offence of Richards, by reason of his abstaining from using his authority to prevent its commission.] There is nothing in the rules which requires the charter-master to see that the banksman does his duty. [WILLES, J.—Do you dispute that there was evidence to justify the conclusion of fact to which the justices came?] No. [WILLES, J.—Then the question is, whether the appellant, who had authority, and whose duty it was to forbid Richards to send down more than eight men and boys at one time, by standing by and not interfering to prevent it, did not virtually authorize and assent to the illegal act of Richards.] Would the evidence sustain a charge of manslaughter against the appellant? In Hale's Pleas of the Crown 438, it is said: "To make an abettor to a murder or homicide principal in the felony, there are regularly two things requisite. 1. He must be present. 2. He must be aiding and abetting ad feloniam aut murdrum sive homicidium. If he were procuring or abetting, and absent, he is accessory in case of murder, and not principal, unless in some cases of poisoning. If he be present, and not *aiding (*15] abetting to the felony, he is neither principal nor accessory." This latter is precisely the case of the appellant here. He is present, but does and says nothing. Aiding and abetting is something active. "If A. and B. be fighting, and C., a man of full age, comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide, as principal in the second degree; but it is a misprision, for which he shall be fined, unless he use means to apprehend the felon." [WILLES, J.—The real question is, what was Howells's duty. If it was his duty to prohibit Richards from sending down the men in violation of the 24th rule, and he did not do so, he was guilty of the offence. "Qui non prohibet quod prohibere potest, assentire videtur."] No special duty as to the descent of the cage is by the rules imposed upon the charter-master: that duty is cast upon the banksman. In *The Queen v. Barrett*, 32 Law J. M. C. 36, 9 Cox Cr. Cas. 255, it was held, that, if a weekly tenant of a house use it as a brothel, and the landlord receive no additional rent by reason of the immoral occupation, the latter cannot be convicted of keeping a brothel, merely because, having notice of the nature of the occupation he does not give the tenant notice to quit. [WILLES, J.—Lord Coke, commenting upon the word "aide" in the Statute of Westminster I

(3 Ed. 1), c. 14, says,—2 Inst. 182,—“Under this word is comprehended all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act, and are not present when the act is done; for, if the party commanding, furnishing with weapon, or aiding, be present when the act is done, then he is principal.” A permission, whether active or passive, by a person having authority to prevent the act being done, is a consenting. WILLIAMS, J.—In all misdemeanors, an accessory before the fact is a principal. The question is whether the facts stated in *this case could be regarded [*16 by a jury as constituting Richards Howells’s agent.] It is submitted they could not, and consequently that he was improperly convicted.

Welsby, for the respondent, was not called upon.

WILLIAMS, J.—The question raised upon this appeal is precisely the same as that which would have been raised for the consideration of the judge, if this, instead of being an offence punishable on a summary conviction, had been made by the statute an indictable offence, and the appellant had been indicted jointly with Richards for an offence which constituted a violation of the 24th rule referred to in the special case. The question then would have been, whether, if the facts here disclosed were laid before a jury, it would have been the duty of the judge to stop the case, or to leave it to them to say whether or not they were satisfied from the evidence that the defendant aided and abetted Richards in the commission of the offence with which they were charged. I am satisfied that in the case supposed it would have been the judge’s duty to leave the question to the jury. The defendant is found to have been close to the pit’s mouth, and so cognisant of the fact that Richards was permitting a larger number of persons to descend at one time than is allowed by the 24th rule. He is the person who has charge of the pit, and who has power to prevent Richards, who is his servant, from lowering down the cage so as to violate that rule. Having authority to prevent the illegal act being done, and having chosen to stand by and see it done without exercising his authority, he might fairly be assumed by those who are constituted the judges of the fact to have aided and assisted in the doing of it. I think the justices were *clearly warranted by [*17 the evidence in coming to the conclusion they did.

WILLES, J.—I am of the same opinion. The respondent has clearly been guilty of a breach of the discipline necessary to be kept up by those who are answerable for the safety of the men. He was present when the banksman let the men down: It was his duty to prevent,—and he might have prevented,—the illegal act, and he did not. I think it is quite right to look to the most responsible person, and to make an example of him, and so make it the interest of those who are most open to the dread of punishment to prevent such offences from being committed. The act of parliament would become a dead letter if such evidence as this would not warrant a conviction.

BYLES, J.—I am of the same opinion. In misdemeanors, all who are present when the offence is committed, and have power to prevent it, and do not exert that power, are equally guilty with him who actually commits the offence. It is plain here that the respondent had power and it was his duty to prohibit Richards from doing as he did.

The justices find in terms that the respondent was the master, and that the actual offender was the servant. By standing by and seeing the offence committed, the respondent afforded active encouragement to the actual offender. The justices clearly came to a correct decision.

Appeal dismissed, with costs.

There was a second information against the same appellant, charging that he "on the 29th of December, 1862, at, &c., being then and there the charter-master of a certain coal-pit there situate, called The *18] Dark *Lane Pit, belonging to the Priors Lee Colliery, did not, in the exercise of his duties as such charter-master, give his first and chief attention to insuring the safety of the lives and limbs of the persons under his charge, contrary to the 20th special rule then in force for the regulation of the said pit and colliery," established pursuant to the statute.

The 20th rule is as follows:—"Every charter-master and underlooker, in the exercise of his duties, is hereby expressly ordered in all cases to give his first and chief attention to insuring the safety of the lives and limbs of those under his respective charge, and to suspend any or all operations attended with unusual risk, until he shall have received special directions of the manager, and to stop the working or use of any pit, engine, ropes, machinery, or apparatus that may not appear safe, until the removal of the danger."

The evidence was the same as in the former case; and the decision of the justices was as follows:—"The evidence in support of the information satisfied us that the defendant was at the pit on the morning in question, that he knew a breach of the rules was being committed, and that he had the power to prevent it. We are also of opinion, from the evidence, that the defendant did not give his first and chief attention to insuring the safety of the lives and limbs of the men under his charge, inasmuch as he did not suspend the operation of lowering the men when he knew there were more in the cage than the number allowed by the rules. We accordingly convicted the defendant, and ordered him to be imprisoned with hard labour for two calendar months, to commence at the same period as the former sentence which had been passed upon him."

The question reserved for the opinion of the court, was, whether the evidence set out in the case was sufficient to warrant the conviction.

*19] *Hayes, Serjt., appeared for the appellant, and Welsby for the respondent.

WILLIAMS, J.—It follows from what the court decided in the last case, that the evidence in this case warranted the conclusion that the appellant was guilty of the offence charged in the second information.

BYLES, J.—The appellant was guilty of a plain breach of both the 15th and 20th rule.

Appeal dismissed, without costs.

DEAN v. MELLARD and Others. *June 9.*

By the 17 & 18 Vict. c. 25, s. 1, it was provided that all actions against any society established under the Industrial and Provident Societies Act, 1852 (15 & 16 Vict. c. 81), shall be commenced and prosecuted against the registered officer of the society, or against the trustees where there is no registered officer. These acts were repealed by the 25 & 26 Vict. c. 87, the 6th section of which provides that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society: and all legal proceedings *then pending* by or against any such trustee or other officer on account of the society, may be prosecuted by or against the society in its registered name, without abatement:"—

Held, that the effect of such repeal was to render the members individually liable to be sued in respect of a contract made by the society prior to the passing of the repealing act, for which no action was then pending.

THIS was an action brought to recover the price of goods supplied by the plaintiff to a society called "The Kidgrove Industrial and Provident Co-operative Society," of which the defendants were shareholders and committee-men, Mellard being chairman of the committee. Plea, never indebted.

At the trial before Bramwell, B., at the last Spring Assizes at Chester, it appeared that the society was established for the making and selling of bread and other articles of daily consumption to its members and others; that it was duly registered on the 28th of December, 1862, under the 25 & 26 Vict. c. 87; that there were two trustees; that the affairs of the society **were* under the management of [**20*] the committee; and that the goods in question had been supplied in pursuance of a resolution of the committee, to which all the defendants were parties, and which was signed by the defendant Mellard as chairman.

The goods were supplied in 1861 and down to July, 1862. The 25 & 26 Vict. c. 87, passed in August, 1862; and this action was commenced in January, 1868.

On the part of the defendants it was contended that the 15 & 16 Vict. c. 81 being repealed by the 25 & 26 Vict. c. 87, the 18 & 14 Vict. c. 115, s. 13, which vested the property of the society in the trustees, remained in force as to provident societies, and consequently that the action should have been brought either against the trustees or against the society in its corporate character, under the 25 & 26 Vict. c. 87, s. 6, which enacts that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society: and all legal proceedings *then pending* by or against any such trustee or other officer on account of the society, may be prosecuted by or against the society in its registered name, without abatement."

The cases of *Butler v. Fannahill*, 5 Ellis & B. 797 (E. C. L. R. vol. 85), and *Myers v. Rawson*, 5 Hurlst. & N. 99, were referred to.

On the part of the plaintiff it was insisted, that, by the repeal of the former statutes by the 25 & 26 Vict. c. 87, all members of these societies who but for such acts would have been liable, became liable individually for goods ordered by them; and that the provision in the 6th section of that act for suing the society in its corporate name merely is permissive, and applies only to proceedings then pending.

The learned judge directed a nonsuit, reserving the plaintiff leave

*21] to move to enter a verdict for 37l. 6s. 6d. *if the court should be of opinion that the defendants were liable personally; and also on the ground that there was no sufficient evidence that there were trustees,—neither party to appeal except by leave of the Court of Common Pleas.

M'Intyre, accordingly, obtained a rule nisi, on the ground that "there was no sufficient evidence of the appointment of trustees, and that, according to the true construction of the statutes relating to friendly and provident societies, the defendants were under the circumstances personally liable to the plaintiff for the goods supplied." [WILLES, J., referred to *Cockerell v. Aucompte*, 2 C. B. N. S. 440 (E. C. L. R. vol 89).]

Morgan Lloyd and *Vaughan Williams* now showed cause.—The plaintiff was properly nonsuited. But for the 25 & 26 Vict. c. 87, this action would clearly have been misconceived; for, it was held in *Burton v. Tannahill*, 5 Ellis & B. 797, that an action for goods supplied for the use of a society established under the 15 & 16 Vict. c. 31, must, by the 17 & 18 Vict. c. 25, s. 1, be brought against the registered officers of the society appointed to sue and be sued, where there are such officers, and it cannot be maintained against an individual member of the society; and in *Myers v. Rawson*, 5 Hurlst. & N. 99, the Court of Exchequer pointed out that the only mode of obtaining satisfaction from a member of the society was by a sci. fa. after a judgment obtained against the registered officers or trustees, under the 17 & 18 Vict. c. 25. It is clear, therefore, that, but for the recent act, this action should have been brought against the trustees. The title of the act is, "An act to consolidate and amend the laws relating to industrial and provident societies." It recites and repeals the 15 & 16

*22] Vict. c. *31, the 17 & 18 Vict. c. 25, and the 19 & 20 Vict. c. 40. By s. 2 it enacts that all societies registered under the Industrial and Provident Societies Act, 1852 (15 & 16 Vict. c. 31), shall be entitled to obtain a certificate of registration on application to the registrar of friendly societies: and s. 6 enacts that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society; and that all legal proceedings then pending by or against any such trustee or other officer on account of the society may be prosecuted by or against the society in its registered name, without abatement." There is no express provision for a case like the present, where the goods are supplied before and the action brought after the passing of the act against individual members of the society. At the time the liability was incurred, it was not competent to a creditor to sue the individuals: he must have proceeded against the trustees. But it is said that the repeal of the former acts which made it necessary to sue the trustees, imposes a liability upon the members of the society who were not liable at the time the cause of action accrued. [WILLIAMS, J.—It will be said that the repeal of the former acts leaves the members as they stood at common law.] No doubt: but, assuming that the right of action against the trustees is taken away by the 25 & 26 Vict. c. 87, what is there to impose a personal liability upon the individual members? [WILLIAMS, J.—It will be said that it is a question of procedure, not of liability.] It is submitted that it is more than procedure: it is

imposing a liability which did not exist before,—which cannot be done by an *ex post facto* law, unless there be express words. [KEATING, J.—All that can be said, is, that the individual members were formerly privileged from being sued by some acts of parliament which have *since been repealed.] No hardship is imposed upon the plaintiff, for the funds of the society may be got at by a proceeding in [*23 equity, or by a winding up under s. 17.

M'Intyre and Griffiths, in support of the rule.—It is an improper use of terms, to say that the members of these provident societies were not personally liable. They were always liable; but certain acts of parliament which are now repealed, regulated, whilst those acts remained in force, the mode of proceeding against them. This is clear from the judgment of Lord Campbell in *Burton v. Tannahill*. The former statute was a restriction on the common-law right of suing: that restriction is now removed. If the plaintiff were left to his remedy under the winding up act, his recourse against the persons who contracted with him might be altogether gone. In *Toutill v. Douglas*, 8 Law Times N. S. 426, it was held that the trustees could not be sued since the passing of the 25 & 26 Vict. c. 87,—Cockburn, C. J., saying: "The act of 1852 and the subsequent acts having been repealed by the 25 & 26 Vict., which contemplated a new status for these societies by making them incorporated, the rights and liabilities of the societies under the repealed acts exist only for the purpose of registration under the new act. It is impossible to say that the repealed acts can any longer exist for the purpose of enabling them to sue or be sued in the names of their officers." The plaintiff, therefore, will be without remedy, unless he can maintain this action.

WILLIAMS, J.—I feel considerable difficulty in dealing with this statute, because I am confident that the consequences which have resulted were never contemplated by the legislature. But, looking at its terms, *and at the decisions which have taken place as [*24 well before as since its passing, I think the rule to enter a verdict for the plaintiff for the sum claimed must be made absolute. In order to arrive at a satisfactory conclusion, it is necessary to see how the law stood before the passing of the 25 & 26 Vict. c. 87, upon which the question arises. Creditors were then compelled to proceed in the first instance by action against the trustees or other public officers; but the individual members might ultimately have been made liable by proceeding against them by *scire facias*, if the corporate fund were insufficient to satisfy the judgment.^(a) It appears to me that the legislature did not mean to interfere further with the common-law liability of the members of the society in respect of contracts made by the trustees. Then comes the statute 25 & 26 Vict. c. 87, the effect of which is to repeal the provisions of the former statutes which compelled the creditor to take the circuitous course I have pointed out, and leave it open to him to proceed against individual members as he might have done if those statutes had not

(a) The 11th section of the 15 & 16 Vict. c. 31 enacted that "nothing in this or the said recited act (the Friendly Societies Act, 13 & 14 Vict. c. 115) shall be construed to restrict in any wise the liability of the members of any society established under or by virtue of this act, or claiming the benefit thereof, to the lawful debts or engagements of such society: Provided always, that no person shall be liable for the debts or engagements of any such society after the expiration of two years from his ceasing to be a member of the same."

passed. The result is, that each individual member is liable, and has his remedy over against the others for contribution. It has been suggested, on the part of the defendants, that the statute 25 & 26 *25] Vict. c. 88 did not intend to cast upon individual members a liability which did not exist before, viz. of being sued *in the first instance. That argument would have been admissible if the legislature, instead of enacting, as they have done, in s. 6, that "the certificate of registration shall vest in the society all the property that may at any time be vested in any person in trust for the society; and all legal proceedings *then* pending by or against any such trustee or other officer on account of the society, may be prosecuted by or against the society in its registered name, without abatement,"—had gone on to say that "all claims and rights of action existing at the time of the passing of the act" might be so prosecuted. But they have not said so: they have confined the indulgence to actions pending at the time of the obtaining of the certificate of registration. That must mean actions commenced before the passing of the 25 & 26 Vict. c. 87, because none could be commenced after against any but existing members. But then it has been contended that the trustees must still remain liable to be sued in respect of claims which were existing before the act came into operation. The case of *Toutill v. Douglas*, however, shows that no action for such a claim can be maintained against the trustees. Although it does not appear from the short statement of the declaration in the report of that case that the cause of action was alleged to have taken place before the passing of the 25 & 26 Vict. c. 88, yet the judgment of Cockburn, C. J., applies equally whether the cause of action accrued before or after that act passed, inasmuch as the non-liability of the trustees was held to be the necessary consequence of the repeal of the former statutes. We cannot, therefore, escape the consequence, that no action will lie against the trustees: the ordinary result, then, must follow, viz. that we must look at the repealed statutes as if they had never existed, and therefore the creditor is remitted to his common-law rights.

*26] *WILLES, J.*—I am of the same opinion. I much regret being compelled to come to this conclusion, because it exposes individuals to liability to an action which they might fairly have supposed could only be brought against the general body of the society. But there can be no doubt, when the acts of parliament and the decisions are looked at, that the direction to proceed against the trustees was merely providing a mode of procedure which was equally for the convenience of the society and of its creditors, and not to take away the liability of the members. But, looking at the 25 & 26 Vict. c. 87, and seeing that it applies only to proceedings pending at the time of its passing, I regret that we have no alternative but to say that the interval, as to debts or claims which arose prior to registration under that act, remains unprovided for.

KEATING, J.—I am of the same opinion. The effect of the statutes for the regulation of industrial and provident societies was, to compel the creditor, for the mutual convenience of all parties, to have recourse to the funds of the society, by suing the trustees before proceeding (by *scire facias*) against the individual members. It was merely opposing an obstacle to the procedure, and was not intended to affect

the ultimate liability of the members of the society. The effect of the repeal of those statutes was, to remove those obstacles, and to restore the liability of the members to what it was at common law. Sharing in the regret expressed by my Brother Willes, I reluctantly come to the conclusion that the 6th section of the 25 & 26 Vict. c. 87 does not include causes of action existing at the time of its passing.

WILLIAMS, J.—Although registered under the 25 & 26 Vict., it is clear that the society could not have been *sued here in its corporate capacity, because the contract was entered into before the [*27 society had any legal corporate existence.

Rule absolute accordingly.

Vaughan Williams, for the defendants, asked leave to appeal, suggesting that the matter was of considerable importance to these societies.

M'Intyre opposed the application, on the ground that the amount was small and the decision unanimous.

WILLIAMS, J.—We are at all times anxious that our decisions should be subject to review. But I cannot say that this is a case in which we ought to allow an appeal, especially as the amount in question is so very small.

Leave to appeal refused.

BARKER v. HIGHLEY. July 6.

The ship's husband, or managing owner, is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight.

Where, therefore, the ship's husband and managing owner caused a bail-bond to be given in the Admiralty Court, in the names of his co-owner and himself, in a suit for a collision, and the suit terminated in favour of the plaintiffs, and the bail were called upon to pay damages, interest, and costs:—Held, that the co-owner was responsible to the bail for the money so paid.

THIS was an action upon a bail-bond given in the Admiralty Court in order to obtain the release of a vessel from arrest in a suit there for collision.

The first count of the declaration was founded upon an implied promise by the defendant to indemnify the *plaintiff from loss [*28 by reason of his having, as surety for the defendant and one Zachariah Charles Pearson, executed a bail-bond to secure the payment (to the extent of the bond) of what might be adjudged against Pearson and the defendant, as owners of the screw steamship *Wesley*, in a suit instituted against them in that court by the owners of the ship *Antelope*.

There were also counts for money paid and for money found due upon accounts stated.

The defendant pleaded never indebted, and to the first count a denial of the promise therein alleged.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—The defendant was a master mariner in the service of Pearson, then a large ship-owner at Hull, and was owner of two 64th shares of the *Wesley*, Pearson being owner of the other sixty-two shares, and acting as the managing owner and ship's husband. On the 17th of September, 1860, a collision took place between the *Wesley* and

the Antelope, and the former vessel was arrested by virtue of process out of the Admiralty Court at the suit of the owners of the Antelope. Highley being abroad, Pearson instructed Hargreaves, his broker, to take the necessary steps; and accordingly Hargreaves, in order to obtain the ship's release, procured Barker (the plaintiff) and one Coleman, to execute a bail bond as sureties for the owners for such sum, not exceeding 5000*l.*, as might be awarded against them in the Admiralty suit, with costs. Upon the bond being given the ship was released, and afterwards she proceeded upon a voyage and earned freight, of which the defendant received his proportion; and ultimately, the vessel being lost, the defendant received 300*l.* for his share of the insurance-money.

*29] Judgment having been allowed to go against the *owners of the Wesley in the Admiralty Court, damages, interest, and costs were awarded against them to the amount of 211*l.* 4*s.*, and a monition was served upon the bail requiring them to pay each a moiety of that sum. The plaintiff having paid his moiety, and Pearson having become bankrupt, the plaintiff now sued the defendant.

Hargreaves, the broker, who was called as a witness, stated that he was employed solely by Pearson, and that neither he nor Barker knew anything of Highley or had any communication with him.

On the part of the defendant it was submitted that Pearson had no power to bind his co-owner by entering into such an engagement without his consent or knowledge.

The learned judge overruled the objection, and a verdict was entered for the plaintiff for 105*l.* 12*s.*; leave being reserved to the defendant to move to enter a nonsuit or a verdict.

Denman, Q. C., in Easter Term last, obtained a rule nisi, on the ground that, under the circumstances proved at the trial, the plaintiff was not entitled to recover, and that neither Pearson nor Hargreaves had authority to bind the defendant so as to make him liable for the expenses paid by the plaintiff as surety. He submitted, that, inasmuch as the defendant could only have been made liable in the Admiralty Court to the extent of the value of his interest in the ship, his co-owner could have no implied authority to bind him for damages and costs which might far exceed that value: and he referred to *Sims v. Brittain*, 4 B. & Ad. 375 (E. C. L. R. vol. 24), 1 N. & M. 594, *Myers v. Willis*, 17 C. B. 77 (E. C. L. R. vol. 84), 18 C. B. 886 (E. C. L. R. vol. 86), *Brodie v. Howard*, 17 C. B. 109, *Hackwood v. Lyall*, 17 C. B. 124, *Mitcheson v. Oliver*, 5 Ellis & B. 419 (E. C. L. R. vol. 85), and *Whitwell v. Perrin*, 4 C. B. N. S. 412 (E. C. L. R. vol. 93).

*30] *Montague Smith*, Q. C., and *Hannen*, showed cause.—The question is, what is the extent of the authority of a part owner of a ship, who is also managing owner and ship's husband. That question must be decided by reference to general principles and to analogous cases. That which it is *necessary* to do for the joint benefit must clearly be within the power and authority of the managing owner: and here it was necessary, in order to enable the ship to earn freight, that she should be released; she was released by means of this bond, and she earned freight, his proportion of which the defendant received. The authority is thus stated in *Abbott on Shipping*, 8th edit. 105, 10th edit. 72,—“It is usual for the several part owners to appoint a person,

frequently one of their own number, to be the manager of their joint concern, their general agent in the use and employment of the vessel, under the name of the ship's husband. His duties and powers as such are often defined and limited by the terms of a special agreement for that purpose between him and his employers or co-owners. Where no such agreement has been made, he is to exercise an impartial judgment in the employment of tradesmen and the appointment of officers, and be careful that his choice in the selection of a master be not biased by any private pecuniary transaction. He is to see that the ship is properly repaired,^(a) equipped, and manned,—to procure freights or charter-parties,—to preserve the ship's papers,—to make the necessary entries,—adjust freight and averages,—disburse and receive moneys, and keep and make up the accounts as between all parties interested. His acts for these purposes are considered to be the acts of all the part owners, who are liable on all contracts entered into by him for the conduct of their *common concern,—the [*31 employment of the ship." "But one part owner, though he be also managing owner, cannot, by ordering an insurance of a ship without authority from another, charge the other with any part of the premium, unless the other afterwards assent to the insurance, because this is no part of the joint concern; a share in a ship being the distinct property of each individual part owner, whose own affair it is to protect it by insurance. So, one part owner, although he be the husband, cannot as such pledge the other to the expenses of a lawsuit." The rule is similarly stated in Story on Agency, §§ 40, 41, and in Story on Partnership, pp. 581, et seq. In Bell's Principles of the Law of Scotland, p. 449, it is said: "The ship's husband is the agent or commissioner for the owners. He may be a part owner or a stranger. His powers are by mandate or written commission by the owners, or by verbal appointment; the latter chiefly where he is also part owner. His duties are,—1. To arrange everything for the outfit and repair of the ship,—stores, repairs, furnishings; to enter into contracts of affreightment: to superintend the papers of the ship,—2. His powers do not extend to the borrowing of money; but he may grant bills for furnishings, stores, repairs, and the necessary engagements, which will bind the owners, although he may have received money where-with to pay them,—3. He may receive the freight; but is not entitled to take bills instead of it, giving up the lien by which it is secured,—4. He has no power to insure for the owner's interest without special authority,—5. He cannot give authority to a law agent that will bind his owners for expenses of a lawsuit,—6. He cannot delegate his authority." If Pearson had paid this money, he might have charged it in the accounts of the ship. In *Whitwell v. Perrin*, 4 C. B. N. S. 412 (E. C. L. R. vol. 93), necessities were *furnished to a ship [*32 on the order of the ship's husband (himself a part owner), by whom alone the ship was managed: and it was held that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship, and, on the bankruptcy of the latter, the plaintiff had proved against their estate for the balance. [WILLIAMS, J., referred to *Preston v. Tamplin*, 2 Hurlst. & N. 684.] In *Rich v. Coe*, Cowp. 636, 639,

(a) See *Williams v. Allsup*, 10 C. B. N. S. 417 (E. C. L. R. vol. 100).

Lord Mansfield said: "Whoever supplies a ship with necessities has a treble security,—1. The person of the master,—2. The specific ship,—3. The personal security of the owners, whether they know of the supply or not. The master is personally liable, as making the contract. The owners are liable in consequence of the master's act, because they choose him: they run the risk, and they say whom they will trust with the appointment and office of master." Here, the defendant trusted Pearson to do all that was necessary for the employment of the ship: and the employment of Hargreaves by Pearson was no delegation of the authority intrusted to him.

Denman, Q. C., and *Milward*, in support of the rule.—Whatever might have been the general authority of Pearson as ship's husband, he clearly had no right to assume that the defendant would intervene in the suit in the Admiralty Court; and there was no necessity for making him intervene so as to become liable for the damages and costs. A part owner of a ship is not necessarily a partner: *Helme v. Smith*, 7 Bing. 709 (E. C. L. R. vol. 20), 5 M. & P. 774. As between the part owners, each is only liable to the extent of his own interest in the ship. His liability in cases of this sort is similarly limited by the 504th section of the Merchant Shipping Act, 17 & 18 *33] Vict. c. 104. That section is *substantially a re-enactment of the 1st section of the 53 G. 3, c. 159, which was under discussion in *Ex parte Rayne*, 1 Q. B. 982 (E. C. L. R. vol. 41). This clearly is not an ordinary incident to the authority of a ship's husband: it was just as much out of the course of the ordinary duty of a ship's husband as was held the instituting a suit for salvage in *Campbell v. Stein*, 6 Dow 116. A ship's husband has no power to insure unless by the authority of his co-owner; *French v. Backhouse*, 5 Burr. 2727; or for repairs which are not *necessary*: *Chappell v. Bray*, 3 Law J. Exch. 24. So, one partner has no authority to bind his copartner by a reference to arbitration (*Hatton v. Royle*, 3 Hurlst. & N. 500), or by consenting to an order for judgment in an action against himself and his copartner: *Hambridge v. De la Crouée*, 3 C. B. 742 (E. C. L. R. vol. 54). [WILLIAMS, J.—Suppose a ship bound on a voyage under a heavy penalty comes into collision with another and slightly damages her, and the ship's husband declining to give bail, the voyage is lost,—would not his co-owners have a right to call upon him for compensation?] It is submitted that they would not. That which was done here was clearly beyond the scope of a co-owner's power and authority. One of several partners cannot bind his copartners, without their consent, by giving a guarantee, or a *cognovit*, or by entering an appearance to an action. [WILLIAMS, J.—This is put upon the ground of necessity.] *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the court: (a)—The defendant in this action was part owner of a vessel which had been arrested in the Admiralty Court, in a suit for collision. The defendant held two sixty-fourth shares only; the other co-owner held the *34] *remaining sixty-two sixty-fourth shares, and acted as ship's husband and managing owner. The latter, in order to obtain the release of the ship, procured the plaintiff and another person to become bail for the ship in the Admiralty Court, and the ship was

(a) The case was argued before Erie, C. J., Williams, J., Willes, J., and Byles, J.

thereupon released. The suit terminated in favour of the owner of the injured vessel. The managing owner of the defendant's vessel became bankrupt, and the ship itself was afterwards lost. The bail having each paid their proper share of the money due on the bail-bond, the plaintiff as one of them sued the defendant in this action to recover his proportion of the money so paid.

At the trial before Byles, J., the plaintiff obtained a verdict; but leave was given to the defendant to move to enter a nonsuit.

The ship's husband, or managing owner, is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight. In this case it was absolutely necessary to release the ship from the Admiralty process,—as necessary as it would have been to employ salvors, had the vessel taken the ground and been in danger of destruction; in which case the salvors, in addition to the security afforded by their maritime lien, might have brought an action against the owners: *Newman v. Walters*, 3 B. & P. 612.

We think the managing owner was not bound to deposit money out of his own pocket, or to mortgage his own shares, or to hypothecate the ship; but that he might do what was necessary according to the rules of the Admiralty Court. Those rules enabled him to obtain a release of the ship by merely procuring bail for damages and costs.

The hardship on the present defendant is undoubtedly great; but that arises from the facts that he was owner of so small a portion of the ship, and that he has lost his remedy against the co-owner by that co-owner's bankruptcy, and against the ship by its subsequent [*35 loss.

We are therefore of opinion that the rule to enter a nonsuit should be discharged. Rule discharged.

KIDNER v. KEITH. June 19.

A deed (which by arrangement was to be executed in duplicate, one to be prepared by each party and to be interchanged between them) was executed by the grantee, but not attested, and was by him sent to the solicitor of the grantors to procure their execution; and they accordingly signed, sealed, and delivered it:—Held, that this was a complete delivery, whereby the estate passed; and that the above arrangement did not render the deed an escrow until the duplicates were interchanged.

THIS was an action of replevin. The defendant avowed that one William Pratt, during all the time for which the rent thereafter mentioned to be distrained for accrued due, and thence until and at the time of the alleged taking of the said goods, held the said dwelling-house and premises in which, &c., as tenant thereof to the defendant under a demise thereof at the yearly rent of 75*l.* payable quarterly, on, &c., in every year, by even and equal portions; and because 185*l.* 15*s.* of the said rent at the time of the alleged taking was due and in arrear from the said William Pratt to the defendant, he the defendant well avowed the taking, &c. Plea, non tenuit. Issue thereon.

The cause was tried before Wightman, J., at the last Spring Assizes at Kingston, when the learned judge directed a verdict to be entered for the defendant, with liberty to the plaintiff to move to enter a ver-

dict for him,—the court to draw any inference of fact from the evidence, which was in substance as follows:—

By indenture of lease of the 22d of April, 1816, between John Young of the one part and James Bush of the other part, the premises in question were demised to Bush for fifty-seven years and a half from the 25th of March then last preceding, subject to the rents and covenants therein mentioned. By divers mesne assignments the premises *36] had become and were, on and prior *to the 19th of July, 1830, vested in one Alexander Macdougall for the residue of the term.

By indenture of assignment of the 19th of July, 1830, between Macdougall of the one part and Henry John Keith (the defendant) of the other part, Macdougall, in consideration of 425*l.* paid to him by H. J. Keith, assigned to him the premises in question for the residue of the term, subject to the rent and covenants contained in the indenture of lease of the 22d of April, 1816.

By indenture of settlement of the 28th of February, 1831, between H. J. Keith of the first part, Mary Keith (the mother of H. J. Keith) of the second part, and G. C. Keith, Mary Eliza Brooks (then M. E. Snook, formerly M. E. Keith), and H. J. Keith of the third part,—after reciting, amongst other things, that the said sum of 425*l.*, the purchase-money for the said premises expressed to be paid by H. J. Keith, was the proper money of Mary Keith, and that in the purchase thereof he was acting as a trustee, and that Mary Keith was desirous that the premises should be held upon the trusts therein mentioned,—it was covenanted, declared, and agreed that he (H. J. Keith), his executors, administrators, and assigns, should stand possessed of the premises so vested in him as aforesaid, upon trust to pay the rents and profits thereof to Mary Keith during her life, for her own separate use, and, after her decease, that the premises should be held upon trust in equal shares for the said G. C. Keith, M. E. Snook, and H. J. Keith.

This deed of the 28th of February, 1831, was a family arrangement: but the recital therein that the 425*l.* was the proper money of Mary Keith was erroneous; it having in fact been part of the estate of John Keith, her late husband, who had died intestate, leaving Mary *37] Keith, his widow, and H. J. Keith, *G. C. Keith, and M. E. Snook, his only children, and sole next of kin.

In 1854, Mary Keith, wishing to get rid of the deed of the 28th of February, 1831, and to have the premises in her own power, applied to H. J. Keith to assign them to her absolutely, which he agreed to do; and an indenture was accordingly prepared for that purpose and endorsed on the indenture of assignment on the 19th of July, 1830, assigning the same to her absolutely. This indenture was signed by H. J. Keith, but was neither dated, attested, or delivered, the solicitor to Mary Keith, who had prepared the deed in ignorance of the prior settlement, at the moment of the execution, hearing of the prior trust, told him that it would therefore be valueless. Mary Keith, however, received the rents down to the time of her death, which took place on the 8th of December, 1855. She had previously made a will, whereby she bequeathed all her property and effects to Joseph Partridge, William Dunk, and M. E. Brooks, upon trust to divide the rents between H. J. Keith and M. E. Brooks (G. C. Keith having previously died) during their lives, and upon trust as to the corpus for the survi-

vor. The will was proved by M. E. Brooks and Partridge, Dunk having resigned.

Prior to her death, viz., in January, 1855, Mary Keith granted a lease of the premises for eighteen years to William Pratt, under whom the plaintiff claimed. The validity of this lease was contested in an action of ejectment between H. J. Keith and William Pratt; which was tried at the Summer Assizes for Surrey in 1861, and its validity established by the decision of this court upon a rule to set aside the nonsuit.

In 1858, an arrangement was entered into by the members of the family, whereby the executrix and executor of Mary Keith were to assign over the lease granted in January, 1855, to the defendant as a trustee for the different members of the family in certain *pro- [*38 portions; and a deed of mutual release and assignment, dated May the 5th, 1858, was prepared, whereby the lease was reassigned to the defendant, subject to Pratt's underlease. This deed also contained covenants by the defendant to indemnify the grantors from the future performance of the covenants of the lease.

In 1859, a bill was filed by the widow and administratrix of G. C. Keith (and her then husband J. C. Hairby), claiming a third of the rents of the premises in question, and praying that the deed of 1854 might be declared invalid; and by a decree dated the 5th of November, 1860, this deed was declared inoperative, and it was also declared that H. J. Keith was a trustee of the property under the deed of the 28th of February, 1831. No notice, however, was taken of the lease of January, 1855.

The main question between the parties was, whether the deed of the 5th of May, 1858, had been delivered as a perfect deed, or only as an escrow; and this depended upon the evidence of Mr. Withall, who acted as the solicitor of Mrs. Keith's executors on the occasion.

Upon his examination in chief, Mr. Withall stated that the deed was duly signed, sealed, and delivered by Mr. and Mrs. Brooks and by Partridge, the co-executor, in his presence; that the deed had been sent to him for execution by his clients, signed by the defendant, but unattested. He also stated that the executors had received from Pratt rent accruing after Mary Keith's death, and that six months after he paid 83*l.* 1*s.* 1*d.* to the defendant.

On cross-examination he said: "The deed of 1858 was to have been in duplicate, one to be kept by the defendant and the other by the executors of Mary Keith. I had sent the duplicate to the defendant to be executed by him and exchanged for that executed by the executors.^(a) Part of the arrangement was, that the *deeds should [*39 be exchanged. I never did apply to the defendant for his duplicate. A year after, I was called upon to deliver up the deed to the defendant. The defendant refused to carry out the arrangement, as he would not recognise Pratt as tenant. I have received the rent from Pratt down to Midsummer, 1858, inclusive, and have paid it one moiety to the defendant and retained the other for the executors."

Lush, Q. C., pursuant to the leave reserved to him, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff for 4*l.* 4*s.*, on the ground "that no assignment of the premises was made to the

(a) The deed in question was this duplicate.

defendant by the alleged indenture of the 5th of May, 1858, the deed having been executed as an escrow." He referred to *Johnson v. Baker*, 4 B. & Ald. 440 (E. C. L. R. vol. 6), and *Bowker v. Burdekin*, 11 M. & W. 128.

Philbrick showed cause.—The question is, whether the deed of the 5th of May, 1858, was delivered so as to be a complete and valid deed, or whether it was delivered as a mere escrow. The question arose before this court in a former case of *Keith v. Pratt*, when the court held that there was a constructive delivery, and that Keith was estopped from disputing the lease. The facts are numerous and somewhat complicated; but the point they result in is,—was the deed of the 5th of May, 1858, executed and handed over by Keith to Mr. Withall, and afterwards executed by the executors of Mrs. Keith, a perfect transaction? It appears from the evidence of that gentleman, that the deed was to have been in duplicate, one to be kept by the defendant, the other by the executors of Mrs. Keith; that one was executed by the defendant and sent to Withall for execution by the executors, and they both signed, sealed, and delivered it in his presence; and that Withall sent a duplicate to the defendant, to be
 *40] *executed by him and exchanged for that executed by the executors, it being part of the arrangement that the deeds should be exchanged; but that he never applied to the defendant for his duplicate. The executors kept and still keep the deed so executed by them and by the defendant. [WILLIAMS, J.—If there was a perfect delivery, but upon confidence that the deed would not be acted upon until the duplicates were exchanged, the estate would pass. In the ordinary case of a deed executed and left with the party's attorney, unless it is delivered to the attorney as an escrow, not to be delivered until the consideration-money is paid or some other condition performed, it operates as a perfect deed.] The fair result of all the cases is, that no formal words are necessary to constitute a delivery as an escrow: *Murray v. The Earl of Stair*, 2 B. & C. 82 (E. C. L. R. vol. 9), 8 D. & R. 278, and the authorities there cited. In *Sheppard's Touchstone*, p. 58, the learned author, having shown that delivery is essential to the validity of a deed, proceeds to describe what is a delivery as an escrow,—“The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good.” The editor (*Atherley*) adds in a note,—“The delivery of a deed may be either absolute, as by delivering it to the grantee himself or to some third person for him without any condition or qualification; or it may be conditional, as a delivery to some third person to keep till some act is done by the grantee; in which case it is not delivered as a deed, but as an escrow, that is, a scrowl or writing which is not to take effect or to operate as a deed till the act required to be done by the grantee is actually performed.” Here there was no condition to be performed
 *41] in order *to make this a perfect deed. It was executed by all the parties, and was intended to be an operative deed; and it was not the less so because the duplicate was not handed over. It was a perfect deed upon the face of it; and the arrangement spoken

of by Mr. Withall was a mere collateral and ancillary agreement, which could not operate to defeat the assignment or to prevent the estate passing. This deed was not an escrow within the above definitions.

Watkin Williams, in support of the rule.—The defendant appears to have signed one part of the deed. There was no evidence that he ever delivered it. It was the part of the deed which was to be kept by him. The executors signed, but they never handed it over. The rule upon the subject of the delivery of a deed as an escrow, is well laid down in *Gudgen v. Basset*, 6 Ellis & B. 986 (E. C. L. R. vol. 88). There, G. having let premises to P. for a term of years, P. paying 100*l.* for the fixtures, a lease by deed was prepared and engrossed on parchment. B. paid down only 50*l.* It was agreed between G. and P. that P. should be let into possession as tenant from year to year on the terms of the intended lease until he paid the balance of the 100*l.* At the same time G. signed, sealed, and delivered the deed, which however he retained in his own possession. No third person was present. No words qualifying the delivery, or expressly stating that it was as an escrow till the payment of the balance, appeared to have been used. G. brought use and occupation against the assignee of P.'s interest; and, on these facts appearing at the trial, an objection was taken that the action ought to have been on the covenants in the deed. It was held that the circumstances warranted an inference in fact that it was agreed by both G. and P., at the time of the execution of the instrument, that it should not operate as a lease until the payment; and *that, if there was such an agreement by both, though no express [*42 words of delivery as an escrow were used, it would not operate as a deed till then, and consequently P. was tenant from year to year under the terms of the instrument, and not tenant under a deed; and that use and occupation would lie against him or the assignee of his interest.] (a) [WILLES, J.—That is nothing more than is said in *Comyns's Digest*, *Fait* (A. 4.): "If a man throws a writing on a table and says nothing, and the party takes it, this does not amount to a delivery, unless it be found to be put there with intent to be delivered to the party."] In *Bowker v. Burdekin*, 11 M. & W. 128, it is laid down by the Court of Exchequer that it is not necessary that the delivery of a deed as an escrow should be by express words; if, from the circumstances attending the execution, it can be inferred that it was delivered not to take effect as a deed until a certain condition were performed, it will operate as a delivery as an escrow only. [WILLIAMS, J.—*Millership v. Brookes*, 5 Hurlst. & N. 797, as far as it goes, is in your favour. It was there held that an indenture sealed and delivered to an attorney who is acting for all the parties to it, with directions that it is not to take effect till something else is done, operates merely as an escrow. I can very well understand that this deed should not be intended by the executors to be binding until executed by the defendant.] The arrangement was, that each party was to prepare and execute one part, and then exchange them.

WILLIAMS, J.—I am of opinion that this rule should be discharged.

(a) Lord Campbell there says:—"I should attach no weight whatever to what the grantor might think or intend when he delivered the instrument, unless I thought that it was intended and agreed by both parties that the delivery should operate only as the delivery of an escrow."

*43] The question raised, when closely *looked at, will be found to be a mere question on the evidence, which, by agreement of the parties, we are to decide, instead of a jury. There is no doubt in point of law, that, where, by express declaration or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should have happened, the deed is not a complete and perfect deed until that event has happened. The question is, whether that principle can be brought to operate here. It seems to me that it cannot. If the facts had been, that the defendant had never executed the deed, and that the delivery by the grantors, though apparently an absolute delivery, might be looked upon as a delivery dependent upon the subsequent execution of the deed by the defendant, the case might have deserved consideration. It might then have been contended that the deed was never intended to take effect until the defendant had executed it. But here it appears that the deed was executed by the defendant; and the only question is, whether the execution and delivery by the grantors was conditional on there being a duplicate of the deed. That there was an arrangement that the deed should be executed in duplicate, there can be no doubt. But the question is, whether it was to be a *condition*. There seems to me to be no reason why we should infer that the delivery by the grantors was to be dependent on a condition that a duplicate should be executed by the defendant. The circumstance of the deed being executed in duplicate in no way affects the position of the parties. The execution of the single deed fully carries into effect the intention of the parties and passes the interest. The execution of a duplicate merely facilitates the evidence. It seems to me that we should be doing what the parties never intended, if we were to hold that the execution of a duplicate was a condition *which was to suspend the operation of the

*44] deed until it was performed. The non-delivery of a duplicate would be merely a breach of an agreement, and not a non-performance of a condition.

WILLES, J.—I am of the same opinion. The only question is whether the arrangement spoken of by Mr. Withall on his cross-examination showed that the deed was delivered upon a condition which was not performed. The statement is that there was an arrangement between the parties that the deed was to be executed in duplicate and exchanged. But, for the reasons given by my Brother Williams, I think it is clear that the execution of the duplicate by the one party was not made a condition to the operativeness of the deed. No benefit could result to the executors from that. The object of the deed was to rid them of trouble, to undo what had been done by the deed of 1854. There can be no doubt that they were well advised in executing it. Their interest and their intention were to have done with the lease. The assignment to the mother was a breach of trust. She was not a purchaser for value, and could not have set up any right against the settlement of 1831. Her executors could derive no benefit from the assignment, and could only expect to be proceeded against in Chancery if they made any claim. Further, it appears that the defendant never was requested to execute the duplicate the execution of which is contended to be a condition. Further, it ap:

pears that the executors never received any rent after the execution of the deed of 1858. And further, it appears that the objection is not now raised by them, but by the tenant. It appears to me that the deed was delivered subject to no condition, that it vested the reversion in the defendant, and consequently that he was entitled to distrain

Rule discharged.

*LARA v. HILL. June 23.

[*45]

A., a clerical agent, was employed to sell an advowson for B. upon the terms contained in a circular in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived at, or any particulars had been given by, or any communication whatsoever had been made from A.'s office, however and by whomsoever the negotiation might have been conducted, and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that *no accommodation that might be afforded as to time of payment or advance should retard the payment of commission.*

A contract of sale having been arranged through A.'s agency, and duly executed, and a deposit paid on the 14th of October, 1862, the residue of the purchase-money being payable on the 31st of December,—Held, that A. was entitled to his commission at all events on the 31st of December, although the full purchase-money had not, for some unexplained reason, then been paid.

THIS was an action brought to recover 125*l.* for commission on the sale of an advowson. The defendant pleaded never indebted.

The cause came on to be tried before Cockburn, C. J., at the last Spring Assizes for the county of Kent, when a verdict was entered for the plaintiff for the amount claimed, subject to the opinion of the court upon the following case:—

1. The plaintiff is an agent for the sale of advowsons, &c., and the defendant is an attorney.

2. In the ordinary course of the plaintiff's business, the commission becomes payable upon the signing of the contract or agreement for the purchase.

3. In July, 1861, the plaintiff was employed by the defendant to sell the advowson of the living of St. Keverne, of which the defendant was the patron.

4. Such employment was upon the terms contained in a printed circular of the plaintiff, the two material clauses of which are as follows,—“Disputes often arise as to the right to commission when principals employ other agencies; therefore, to avoid all question upon this, it is distinctly understood that the commission becomes payable upon the adjustment of terms between the contracting parties in every instance in which any information has been derived at, or any particulars, whether in writing or otherwise, have been given by or any communication whatsoever has *been made from, this office, however and by whomsoever the negotiation may have been conducted, and notwithstanding the business may have been subsequently taken off the books, or the negotiation may have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals may have made themselves liable to pay commission to other agents.”

"No accommodation that may be afforded as to time of payment or advance, to retard the payment of commission."

5. The plaintiff, having negotiated with many parties for the sale, ultimately, on the 18th of August, 1862, made a binding arrangement with a Dr. Pinnock for the purchase by him of the advowson, upon the terms contained in the instructions for sale given by the defendant, and with his approbation.

6. A draft agreement or contract for the sale and purchase of the advowson was prepared by the plaintiff and sent to the defendant.

7. On the 2d of October, 1862, an agreement between the defendant and Dr. Pinnock for the sale and purchase of the advowson was duly signed, by which the sum of 350*l.* was made payable on the 14th of October, 1862, by way of deposit, and the residue of the purchase-money (415*l.*) on the 31st of December, 1862. This agreement was prepared by the attorneys of the parties thereto, and without the knowledge of the plaintiff; and its terms were substantially the same as those previously agreed upon between the plaintiff and Dr. Pinnock.

8. The 350*l.* was duly paid: the residue remains unpaid to the present time: but there is no reason to suppose that the purchase will not be ultimately completed.

9. The writ in this action was issued on the 3d of February, 1863.

*10. It is agreed between the parties that the pleadings in this *47] action on both sides shall form part of this special case, and that the court may draw any inferences from the facts.

11. The plaintiff contends, that, when an agreement was entered into with a person the vendor was content to accept as purchaser, the right to commission accrued: and that he, as the agent introducing the accepted purchaser, was then entitled to receive his commission; and that he was not bound to wait until the purchase-money was paid, and the whole transaction completed.

12. The defendant contends that the right to such commission did not accrue, and the plaintiff as agent was not entitled to receive his commission until the purchase-money was paid, and the whole transaction completed.

The question for the opinion of the court was, whether the commission became payable before action.

If the court should be of opinion that it did, then the verdict entered for the plaintiff was to stand, but to be reduced to 125*l.* If the court should be of a contrary opinion, then a verdict was to be entered for the defendant, unless the court should also be of opinion, that, although the plaintiff could not claim commission, he was under the circumstances entitled to recover something, in which case the verdict was to stand, but to be reduced to such an amount as should be ascertained in such way as the court might direct.

*48] *Joyce*, for the plaintiff.(a)—The case shows that the *plaintiff found a purchaser for the advowson, and that the contract was duly

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the contract entered into between the plaintiff and the defendant was, that the commission should be payable upon the adjustment of terms between vendor and purchaser:

"2. That, the case finding that such was the contract, and that the terms had been adjusted

signed and a deposit paid: and there was no reason to doubt that the remainder of the purchase-money would be forthcoming. The plaintiff has therefore done all that was necessary to entitle him to his commission according to the terms of his employment. The special clause in the plaintiff's circular amounts to a statement of what is the general understanding in these cases. There having been an absolute adjustment of the terms of the contract, the vendor cannot deprive the agent of his commission by choosing to give time for payment of the balance of the purchase-money. [BYLES, J.—If the terms of the bargain had been that the commission should be payable upon the completion of the contract, it might possibly have been contended that that event had not happened until the payment of the purchase-money.] Even that would be no answer to the plaintiff's claim, if the payment of the purchase-money was delayed by the act of the defendant himself. The intention of the parties evidently was, that the commission should become payable as soon as the terms were finally adjusted between the vendor and the vendee. And this is no hardship on the defendant. He has accepted the purchaser, and has received the deposit, *and got a binding bargain; and, for anything that appears to the contrary, he may receive the balance of the purchase-money to-morrow. [*49]

M. Jones (with whom was *Lush*, Q. C.), for the defendant.(a)—The special clause in the plaintiff's circular only applies where the principal, after employing the plaintiff, has gone to another agent and obtained a more advantageous bargain: if it were otherwise, there would have been no necessity for the stipulation that "no accommodation that may be afforded as to time of payment or advance shall retard the payment of commission." And, if the special clause did apply, no time being fixed for the payment of the commission, it is not due until the whole of the purchase-money is paid. [WILLIAMS, J.—The commission is to be paid notwithstanding time given to the purchaser for completing the purchase by paying the money. This action was not commenced until after the purchase-money had become due.]

Joyce, in reply, was stopped by the court.

WILLIAMS, J.—I am of opinion that the plaintiff is entitled to judgment. I feel some difficulty in saying that the effect of the contract between these parties is, that the commission is in all cases payable upon the *adjustment of the terms between the vendor and the purchaser. But it is unnecessary to decide that, because here [*50] the action was not brought until the time was passed at which the purchase-money had become payable. Mr. Jones says that this construction is inconsistent with the clause in the printed circular,—“No

between vendor and purchaser, time given to the purchaser by the vendor for the completion cannot postpone the plaintiff's right to his commission:

“3. That the special terms of the printed circular, so far as they affect the present case, are in accordance with the practice found as the usage in the plaintiff's profession, that the commission becomes payable upon the signing of the contract,—in other words, upon the adjustment of the terms.”

(a) The points marked for argument on the part of the defendant were as follows:—

“That there was no agreement by the defendant to pay the plaintiff commission, unless there was a sale completed, and the sale has not been completed: and that the contract was entire, and, until there was a sale completed, the plaintiff had not done all that was required to be performed on his part, and no right of payment of any amount arose until the whole commission was earned on completion of the purchase.”

accommodation that may be afforded as to time of payment or advance to retard the payment of commission." But I apprehend the meaning of that is simply this, that, if the vendor, who has by the terms of the contract a right to insist on payment of the purchase-money by a given day, chooses to enlarge or extend the day of payment, such extension of the day of payment shall not retard the agent's right to his commission. I think the plaintiff was clearly entitled to payment at the time he commenced his action.

WILLES, J.—I am of the same opinion. The purchase-money was by the terms of the contract due two months before the commencement of this action; and no satisfactory account is given why it has not been paid; nothing is stated to warrant the notion that there was any unwillingness or inability on the part of the purchaser to pay it. The only fair conclusion of fact, therefore, which we can arrive at, is, that the defendant has chosen to accommodate Dr. Pinnock by not calling upon him to complete the purchase at the time he was entitled to do so. Besides, he will receive interest on the money in the meantime, and so be placed virtually in the same position as if the purchase had been completed on the 31st of December. I am clearly of opinion that the clause as to accommodation applies: it obviously points to a voluntary act on the part of the vendor. The plaintiff was entitled to his commission at the latest on the 31st of December.

*51] BYLES, J.—I also am of opinion that the plaintiff is *entitled to recover in this case. There are four epochs at which the commission may be payable,—first, at the time of the adjustment of the terms of the sale, or,—secondly, at the time stipulated by the contract, or,—thirdly, at the time stipulated for the completion of the purchase, or,—fourthly, at the time of the actual payment of the purchase-money. I was at first disposed to agree with Mr. Joyce that the special clause in the plaintiff's circular amounted to an implied agreement that what is there stated is the understanding in all cases. That, however, upon consideration, I conceive to be doubtful. Then we come to the time mentioned in the contract. It seems to me that the words "no accommodation that may be afforded as to time of payment or advance to retard the payment of commission," show that the commission becomes due when the money stipulated as the purchase-money becomes payable; and that is general and applicable to all cases. If the vendor for any reason thinks fit to postpone the day for the completion of the contract by payment of the purchase-money, the commission becomes due, not at the time of actual payment, but at the time when by the contract it ought to have been paid. For these reasons, I agree with the rest of the court in thinking that this action was rightly brought, the time for the payment of the purchase-money for the advowson in question having elapsed before its commencement.

Judgment for the plaintiff.

***ELLIS v. THE MAYOR, ALDERMEN, AND BURGESSES
OF THE BOROUGH OF BRIDGNORTH. *July 6.* [*52]**

From time immemorial, until lately, a weekly market had been held in the High Street of Bridgnorth. The market belonged to the corporation of Bridgnorth, who were also lords of the manor in which the borough is situate. The plaintiff was the owner of a house in the High Street; and he and the previous owners and occupiers of that house, as well as several other occupiers of houses in High Street, had from time immemorial erected, on market-days, stalls opposite their respective houses, and had exposed thereon goods for sale in the market, or let the stalls for hire to others who had done so: and no payment had ever been made to or claimed by the corporation for stallage or for tolls of things sold at such stalls, though they took tolls of similar produce exposed elsewhere in the market. The corporation removed the market to another place within the borough, at a small distance from the High Street, and so necessarily injuriously affected the interests of those who had rights in the old market:—

Held, that the plaintiff was entitled to maintain an action for the unlawful disturbance by the corporation of his enjoyment of this right,—which was probably conferred in consideration that the holding of the market must necessarily diminish on market-days the trade and custom of the shops kept in such houses, and the shopkeepers were therefore privileged to advance, as it were, their shops into the market itself by having stalls in the street commensurate with the fronts of their houses, and consequently that the enjoyment of the stalls by the owners and occupiers of the houses, and those licensed by them, was sufficiently connected with the enjoyment of the houses to satisfy the rule acted upon in *Ackroyd v. Smith*, 10 C. B. 164, and *Bailey v. Stephens*, 12 C. B. N. S. 91, that no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof.

Held also, that the removal of the market was not justifiable under the Public Health Act, 1858 (11 & 12 Vict. c. 63), or the Local Government Act, 1858 (21 & 22 Vict. c. 98), inasmuch as the power to provide market-places conferred upon the local board by the 50th section of the last-mentioned act, is expressly qualified by the proviso that no market shall be established so as to interfere with any rights enjoyed by any person, without his consent.

THIS was an action brought by the plaintiff against the defendants for disturbing him in the enjoyment of his alleged right of placing a stall for the sale of goods by himself or his licensees, on market-days, in front of his shop in a market held in the High Street, Bridgnorth.

The first count of the declaration stated, that, before and at and during the times of the committing by the defendants of the grievances thereafter in that count mentioned, a market for the buying and selling of divers goods and merchandises was lawfully held in High Street, Bridgnorth, to wit, weekly, on Saturdays, and during all the said times the plaintiff was possessed of a house in High Street aforesaid, and entitled to a certain liberty, easement, or privilege, to wit, that of placing a stall or standing in High Street aforesaid, on the days when the said market was held as aforesaid, for the sale thereof by the plaintiff or others by his permission, for reward to the plaintiff, of such goods *as aforesaid belonging to him or them respectively in the said market to persons frequenting the said market, [*53 as to the said house appertaining and belonging; which said stall or standing was at and during the said times used for the purpose aforesaid by a certain person by the plaintiff's permission, for reward payable by him to the plaintiff: Yet the defendants on several occasions whilst the said market was held and the plaintiff possessed and entitled as aforesaid, wrongfully disturbed the plaintiff in the enjoyment of his said liberty, privilege, or easement, and wrongfully established and held, on the days on which the said market in High Street was held, a market for the buying and selling of such goods and merchandise, near to the place where the said market was held as aforesaid, and wrongfully kept and continued the said market so held thenceforth

up to the commencement of this suit; whereby the plaintiff's said liberty, privilege, or easement was rendered less valuable.

There was a second count similar to the first,—the breach being that the defendants on several occasions, whilst the said market was held and the plaintiff entitled and possessed as aforesaid, unlawfully disturbed the plaintiff in the enjoyment of his said liberty, privilege, or easement, and on the said occasions wrongfully obstructed the holding of the said market, and wrongfully continued such obstruction as aforesaid; whereby the plaintiff's said liberty, privilege, or easement was rendered less valuable.

The third count stated, that, before and at and during the times of the committing by the defendants of the grievances in that count mentioned, a market for the buying and selling of divers goods and merchandise was lawfully held in High Street, Bridgnorth, to wit, weekly, on Saturdays; and during all the said times the plaintiff was *54] lawfully possessed of a house in *High Street, Bridgnorth, and certain land in High Street aforesaid near the said house was in the possession of the plaintiff's tenant, the reversion thereof belonging to the plaintiff, on which land the plaintiff's said tenant then lawfully kept, on the days on which the said market was held as aforesaid, a stall or standing for the sale by the plaintiff's said tenant of such goods as aforesaid in the said market to persons frequenting the same, and then lawfully sold thereat such goods as aforesaid to such persons: Yet, &c., breach as in the first count.

The defendants pleaded,—first, not guilty,—secondly, that the said alleged market was not at any of the said times when, &c., lawfully held in High Street, Bridgnorth, aforesaid,—thirdly, to the first and second counts, that the plaintiff was not at the times therein mentioned, or either of them, entitled to the said supposed liberty, easement, or privilege in those counts respectively mentioned, nor was the said stall then used for the purpose therein mentioned,—fourthly, to the third count, that, at the times therein mentioned, the said land in High Street was not in the possession of the plaintiff's tenant, nor did the reversion thereof belong to the plaintiff, as alleged,—fifthly, to the third count, that, at the said times when, &c., the plaintiff's tenant on the said land did not lawfully keep, on the days on which the said market was held, the said stall or standing for the purpose therein mentioned. Issue thereon.

The cause came on for trial at the Shropshire Spring Assizes, 1862, when a verdict was by consent entered for the plaintiff for the damages in the declaration (5*l.* 5*s.*), subject to a special case, the court to be at liberty to draw inferences of fact, and to direct any amendments in the pleadings or otherwise which might be thought necessary for the justice of the case. The case stated was as follows:—

*55] *1. The town of Bridgnorth, in the county of Salop, was and is an ancient borough and market town. Prior to the passing of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, the corporation of Bridgnorth was a corporation by prescription, under the style of "The Bailiffs and Burgesses of the borough of Bridgnorth;" their privileges being secured to them by charters of King Henry the Second, King John, King Henry the Third, and King James the

First. The borough is included in the 2d section of Schedule A. annexed to the said Municipal Corporation Act.

2. The corporation are the lords of the manor of Bridgnorth (which includes the borough), and, subject to any rights which the facts hereinafter stated may show to be in the plaintiff, are the lords and owners of the market and of the soil of the streets in the said town, including the principal street, called High Street.

3. From time immemorial, until the year 1838, an open market for the sale of horses, cattle, sheep, pigs, corn, and all kinds of provisions and merchandise, has been held weekly, on Saturdays, in the High Street; and, for the greater accommodation of the persons frequenting this market, the corporation in the year 1850 erected a market-hall in the middle of the High Street. There is no evidence to show that any arrangement or payment was made for or by reason of its erection with or to the owners or occupiers of the houses in front of which the market-hall extends. Such portions of the goods brought to the market as could be provided with accommodation under the market-hall have ever since continued to be exposed there; but the rest, with the horses, cattle, sheep, pigs, and corn, were exhibited for sale in the open High Street. From the time of the erection of the market-hall, the corporation have exercised the entire and sole *control over it and the standings in it, and have received payments in respect of such standings on two of the days [*56 on which fairs are held in the borough (there being eight fair days during the year); but they have not received any payment in respect of the said hall or standings on market-days.

4. The market continued to be thus held until the year 1838, when the corporation of the borough, under by-laws made in that behalf, removed the pig-market and also the cattle-market to another part of the town. The other commodities brought to the market continued to be exposed for sale in High Street.

5. The corporation appointed clerks of the market, and formerly took tolls in kind of corn, grain, fruit, nuts, and other like produce brought into the market; and, at various times from a very early period, let out such tolls for considerable sums: but the taking of such tolls was suspended in the year 1817 by order of the corporation, and they have never since been collected. No tolls were ever taken of goods sold at the stalls hereinafter mentioned, nor was any rent or sum of money ever received by the corporation in respect of such stalls, except for two stalls standing on a piece of land belonging to the corporation, near the town-hall.

6. The plaintiff is the owner and occupier of a house in High Street, standing on the west side thereof; and he and the previous owners and occupiers of his house, as well as several other occupiers of houses in High Street, have from time immemorial erected on market-days wooden movable stalls or standings, with tarpaulin coverings; and these have been set up or erected opposite to their respective houses in the said street; and they have either used such stalls or standings for the display and sale of their own merchandise, or let them to other persons attending the said market, who have paid for the right of standing and the use of *such stalls, to the occupiers of the houses opposite to which the same have been placed, certain sums [*57

agreed upon between them and such other persons and the occupiers, and which in the plaintiff's case have amounted to 13*l.* a year. Such user has been as of right and without interruption, except so far as the facts stated in this case may show to the contrary. The plaintiff has never himself used such stalls or standings for the display and sale of his own goods, but has always let them to others.

7. Amongst the plaintiff's title-deeds are three several conveyances of the property, dated respectively in the years 1735, 1782, and 1821, in which the words "stalls and standings in the street" are used among the general words at the end of the parcels; but no number is specified in any of them. Similar words occur in old conveyances and leases of houses in various parts of the town of Bridgnorth; but there is no evidence of any user under or according to such conveyances or leases.

8. The stalls or standings occupy part of the highway on market-days, and to that extent obstruct the free passage of the public. The highway on the east side of the said market-hall is left open and unobstructed for the use of the public.

9. The corporation have from time to time regulated the standings in the market on the east side of the market-hall, for the prevention of encroachments on the carriage thoroughfare, which is and always has been used only on that side of the street on market-days; and, when disputes have arisen between the people attending the market, either in respect of the standings in any part of the High Street or of any other matter, the policemen of the borough have by order of the mayor interfered to settle such disputes: but they have not interfered *58] with the plaintiff's *standings; nor have the corporation or any one acting under their authority interfered with the right of stallage as between the occupiers or owners of the houses in High Street who had stalls or standings to let and those to whom they were let.

10. In the year 1854, a joint-stock company for the purpose of erecting new market-buildings in the said town of Bridgnorth was formed under the provisions of the 7 & 8 Vict. c. 110, and was afterwards registered under the provisions of the Limited Liability Act, 1855 (18 & 19 Vict. c. 133), by the name of "The Bridgnorth Public Buildings and Markets Company, Limited." The company erected certain buildings on a site out of High Street, but within twenty yards of that part of it where frequenters of the market had exposed their wares for sale, and at a distance of 110 yards from the old market-hall, and of 150 yards from the plaintiff's house. On this site, in the course of the years 1855 and 1856, they erected large buildings, with conveniences for holding the market therein, and for other purposes. [A plan was annexed to and was to form part of the case, showing the situation of the High Street, the position and extent of the stalls or standings therein, the market-hall, buildings, and houses referred to in the case, the boundaries of the parishes, and also the size of the said buildings.]

11. The said company has not obtained from the Crown any charter or grant empowering it to establish a new market in the said borough of Bridgnorth; nor has it obtained any act of parliament or other authority to enable it to remove or in any way interfere with

the said market so from time immemorial existing in High Street aforesaid.

12. The new market was first opened by the company in December, 1856, and a large number of persons went into it; but, as a considerable portion still *continued to use the old market, the remainder returned gradually; and the new market was closed. [*59

13. The Public Health Act, 1848 (11 & 12 Vict. c. 63), was, by order in council in 1853, applied to the borough of Bridgnorth; and the Local Government Act, 1858 (21 & 22 Vict. c. 98), took effect in the said corporate district from the 1st of September, 1858, and such act has since been in full force and operation within such corporate district.

14. By the last-mentioned statute (s. 24) it is enacted that the duty of carrying into execution the said act shall be vested in a local board, and that such local board in corporate boroughs shall be the mayor, aldermen, and burgesses acting by the council: and the 50th section of the act enacts that the local board in corporate districts shall, with the consent of two-thirds of the local board, have power to do the following things, or any of them, within the district:—

1. To provide a market-place and construct a market-house and other conveniences for the purpose of holding markets: to provide houses and places for weighing carts: to make convenient approaches to such markets: to provide all such matters and things as may be necessary for the convenient use of such market: to purchase or take on lease land and public or private rights in markets and fairs for any of the foregoing purposes: to take stallages, rents, and tolls in respect of the use by any person of such market-house. But no market or slaughter-house shall be established in pursuance of this section, so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, chartered, joint-stock, or incorporated company, without his or their consent.

2. For the purpose of enabling the local board to establish markets in manner aforesaid, or to regulate *markets already established in any corporate borough before the constitution of a local [*60 board therein, there shall be incorporated with this act the provisions of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), in so far as the same relates to markets, with respect to the holding of the market or fair and the protection thereof, and with respect to the weighing goods and carts, and with respect to the stallages, rents, and tolls, and with respect to by-laws,—subject to this proviso, that all tolls leviable by the local board in pursuance of this section shall be approved of by one of Her Majesty's principal secretaries of state.

15. Shortly after the passing of this act, the members of the local board opened negotiations with the company for a lease of their market-buildings: and on the 14th of December, 1860, a lease was executed between "The Bridgnorth Public Buildings and Market Company, Limited" of the one part, and "The Bridgnorth Local Board of Health" of the other part, whereby the company let to the said local board all such parts of the said buildings and markets as had been appropriated for a general market, a butchers' market, and china, glass, and crockery stands, and all the stalls and fittings in the said markets, and also the use for the purpose of a corn-exchange (but for no

other purpose) on every Saturday during the continuance of the said demise, of such part of the said buildings as had been appropriated for an assembly-room, To hold the same (subject to an indenture of mortgage dated the 17th of December, 1857, made between the company and one Cooper) unto the said local board from the 14th of December, 1860, for the term of twenty-one years, at a pepper-corn rent: and it was thereby agreed and declared that the said buildings and premises (except the assembly-room) should be used as a market, and that the use

*61] of the *assembly-room for a corn-exchange should be altogether discretionary with the said local board, that, until used as a corn-exchange, the said company might use the said room as they might see fit; and that the company should make certain fittings and alterations for the purpose of a market at their own expense, and according to the plan of the surveyor of the local board, to be approved of by two justices of the peace of the said borough: And it was thereby further agreed and declared that the weighing-machine already in the said High Street should be used for the weighing of carts and carriages, and the said board of directors should find and procure all additional implements whatsoever (except a cart-weighing apparatus) which might be required for the management of the markets, and should keep such additional implements and the demised premises in sufficient repair, and defray all expenses attending the management thereof; and, if the said directors should fail so to do, it should be lawful for the said local board to find and provide such implements and to keep the same and the said demised premises in such sufficient repair, and with or out of the stallages, rents, and tolls to be levied and received by them in respect of the said premises, to pay all the expenses of such implements and repairs and all necessary expenses attending the management of the said premises: And the local board in and by the said lease covenanted with the company that they would, so far as they lawfully could, before fixing the amount of stallage rents and tolls leviable by the said local board, consult and advise with the said company, and, so far as the law permitted, would allow the said company or directors thereof to join with them in settling the rates and amounts thereof respectively, and would cause the same to be approved of by one of Her Majesty's principal secretaries of state, and that the

*62] *said local board would, so far as they legally could, use their best endeavours to prevent any person or persons other than a licensed hawker selling or exposing for sale any articles in respect of which tolls were authorized to be taken in any of the said markets, in any place other than in the said markets, or in his or their own dwelling-place or shop: But it was provided and declared that they should not be obliged to take or institute any proceedings against any person or persons whomsoever, unless specially requested by the board of directors of the company to do so: And the company thereby covenanted with the local board that they would save harmless and keep indemnified the local board from and against all actions, suits, proceedings, claims, demands, costs, charges, losses, damages, and expenses which might be commenced or prosecuted against them, or which they might sustain, be at, or be put unto by reason or on account of the local board holding markets in the said buildings and premises as aforesaid, or preventing or endeavouring to

prevent (at the special request of the board of directors as thereinbefore mentioned) any person or persons selling or exposing for sale articles out of the aforesaid markets, or by reason or on account of any compensation or damages or which might be payable in respect of the matters connected with the said markets or the holding thereof, or any claim for such compensation, or by reason or on account of any act, matter, or thing whatsoever which they the local board should do under or by virtue of the said lease or the powers of the Local Government Act, 1858, or for the purpose of carrying into effect any of the powers or provisions of the said lease or the said act, or any matter or thing connected therewith: And it was thereby further agreed and declared, that, in case the said local board should at any time after the expiration of seven *years [*63 from the date thereof, and during the continuance of the said demise, be desirous of purchasing the whole of the said buildings and markets for the time being belonging to the said company, they should be at liberty to do so at a price to be fixed by arbitration; and that no act or omission by or on the part of the said J. H. Cooper as a director of the said company, should prejudice or in any wise affect his right or remedies as a mortgagee. The said lease was executed by Cooper as a deputy-chairman of the said board of directors, and by J. L. Whatmore, mayor of the said borough, as chairman of the local board of health, under their respective official seals.

16. The legal estate in the new market-buildings had been, previously to the execution of the said lease, vested in the said J. H. Cooper, to whom the company had conveyed them by way of mortgage to secure a sum of 2500*l.* and interest; and there is now due to him upwards of 2800*l.* on such security; and the legal estate has continued vested in him from the time of the mortgage.

17. The local board having possession of the new buildings under the lease, the same were inspected by two justices; and on the 12th of January, 1861, a certificate was signed by them verifying that such new buildings so leased as aforesaid were completed and fit for public use as a market-place for the said town of Bridgnorth.

18. The defendants prepared and issued a table of tolls to be taken in the new market; and the same was, on the 4th of January, 1861, approved by one of Her Majesty's principal secretaries of state.

19. The defendants, pursuant to the acts in that behalf, had previously published in the Bridgnorth Journal a notice that the local board of health intended to apply after the end of one month to Her *Majesty's principal secretary of state for the allowance of certain by-laws for regulating the use of the market-place, which might [*64 be inspected at all reasonable times without fee or reward, and a copy thereof furnished to any person applying for the same upon the terms stated in the said act, and also a copy of the proposed table of tolls.

20. The plaintiff's attorney had previously, on behalf of certain persons whom he did not name, but who, he stated, were entitled to stalls in the market, given notice to the clerk of the board of his intention to oppose any such application, and that he should apply to the Court of Chancery for an injunction to restrain the removal of the market. Immediately after the publication of the notice in the local

paper, T. Whitefoot, J. M. Glasse, and C. J. Lewis delivered to the local board a written notice to the effect that, feeling themselves to be parties aggrieved by, and being desirous of objecting to, these by-laws, they intended to oppose their allowance by Her Majesty's principal secretary of state, and to request permission to attend before him, by themselves, their counsel, attorney, or agent, and that the nature and grounds of their objections to such by-laws were, amongst others,—that the said by-laws, and particularly the first of them, appointing a new and different situation for the market to be held from the situation in which it had been held from time immemorial, thereby attempting to remove the said market into another street, in a different parish,—without having first obtained their consent and that of others having prescriptive rights of stallage in the street where the market had always been held, as well as the rights, powers, and privileges which they had hitherto enjoyed within the district,—were repugnant to the laws of England and the provisions of the Local *65] Government Act, 1858, and the *Markets and Fairs Clauses Act, 1847, and that the said local board had exceeded their jurisdiction in making such by-laws, as well for the above-stated reasons as for other reasons appearing on the face thereof.

21. The said T. Whitefoot, J. M. Glasse, and C. J. Lewis did then and still do occupy houses on the same side of the High Street as the house of the plaintiff; and all claimed rights in respect of their respective houses similar to those claimed by the plaintiff in respect of his house; and they afterwards were co-plaintiffs with him in the bill in Chancery after mentioned.

22. The board being advised, however, by their counsel, that it was unnecessary to lay the by-laws before the secretary of state, no application was made in pursuance of the notice for his sanction of the by-laws; and the proposed scale of tolls was alone laid before and sanctioned by him on the 4th of January, 1861: and the market was afterwards, as hereinafter mentioned, opened in the new buildings by the defendants, without the sanction of the secretary of state being obtained for the by-laws.

23. On the 15th of January, 1861, a bill in Chancery was filed by the plaintiff in this action, together with nine other occupiers of houses in the said High Street, against the defendants in this action, praying that the defendants, acting by their council, and their servants and agents, might be restrained by the order and injunction of that court from establishing or holding a market in the said new market-buildings, and from using the said buildings for the purposes of a market, and from taking any tolls in respect of market-stalls therein, and from otherwise interfering with the rights, powers, or privileges of the plaintiffs in that *suit as occupiers of the houses occupied by them in *66] High Street aforesaid.

24. On the 31st of January, 1861, a motion was made before Wood, V. C.; but his honour did not grant the injunction, because he considered there were disputed questions of law and fact which should be tried at law: and he ordered the motion to stand over for the plaintiffs to bring such action as they might be advised.

25. On the 8th of February, 1861, the corporation of Bridgnorth, by the town-council, adopted the following resolution,—“Whereas, by

the records of the town, it appears that the corporation originally, by the title of The Mayor, Aldermen, and Burgesses, have exercised their privileges as lords of the manor within the town and liberties of Bridgnorth, and as owners of the soil of the public streets, frontages, and waste grounds and public buildings throughout the borough town of Bridgnorth, and by the award of the commissioners for the enclosure of the common of Morfe adjoining the town, dated in the year 1808, they were recognised as lords of the manor and the said borough, and that from time immemorial they have exercised control over the market and fairs of the said borough: And whereas buildings have been erected at the south end of High Street, about the centre of which street the prescriptive markets have from time immemorial been and are now held on Saturday, weekly, under the control and regulation of the corporation: And whereas such buildings have been erected by private individuals, and have been appropriated and adopted for a covered market and other public purposes at an estimated cost of upwards of 8000*l.*, and have been leased to the local board of health under certain stipulations which will ultimately tend to the general advantage of the town and its inhabitants, by rendering *unnecessary the taking up loans on mortgage of the district-rates for such purpose; to which covered market the council, acting for the corporation, have been invited to remove the present market from the streets: Considering, therefore, the present heavy debt on the town, and the great convenience it would afford to the inhabitants and others frequenting the market, and the absence of any risk to the public funds of the town,—the council, acting for the corporation, deem it expedient that the market already established in High Street, on the ground-floor of the town-hall there, should be removed from High Street and the east end of Listley Street: The mayor, aldermen, and burgesses, acting by the council, Resolved, that, in the exercise of all rights the corporation, as lords of the manor, owners of the soil in the public streets, and lords of the market in the borough of Bridgnorth by prescription, the prescription markets hitherto held on Saturdays at the town-hall and in High Street in Bridgnorth aforesaid, shall on Saturday the 23d of February instant be removed from thence to the covered market-place at the south end of High Street and east end of Listley Street: Also that the said market, when removed, shall be henceforth held at the said covered market-place on Saturdays, and so continued from time to time: Also that the public notice of the same now produced to the council, and read over, is approved on behalf of the corporation, and it is agreed shall be published twice in the Bridgnorth Journal, viz., on the 9th and 16th of the present month of February, and circulated largely by hand-bills in the town, and that the same be proclaimed by the town-crier on Saturday the 9th and 16th of February instant: Also that notice be given to the other occupiers of stalls on market-days for the sale of merchandise on the ground-floor of the town-hall, that the *corporation withdraw their consent as owners of the same, and from and after the 16th of February instant the occupation of such ground-floor of the town-hall on market-days for the purpose of sale of merchandise therein shall cease: Also that notice be given to the other occupiers of stalls

on market-days on the site of old buildings in High Street, for which they pay acknowledgments to the borough treasurer."

26. The local board of health afterwards, on the 8th of February, 1861, came to the following resolution,—“That, in pursuance of the provisions and powers vested in the local board of health by the Local Government Act, 1858, and the clauses of the acts incorporated therein, the covered market-place provided for the town by the local board of health, situate at the south end of High Street and east end of Listley Street be appropriated for holding the markets on Saturdays, subject to such regulations as are prescribed by the said Local Government Act and acts therein incorporated; nevertheless so as not to interfere with any rights or privileges within the said borough, which under the 50th section of the Local Government Act, 1858, ought not to be interfered with: Also that the local board of health do fully concur in and approve of the proposed form of public notice of removal of the market and the adoption of the covered market-place provided for that purpose, read over at this meeting, and agreed that the same be published twice in the borough journal and by hand-bills distributed at the discretion of the mayor, and that all other matters and things be done which are authorized by the Local Government Act, 1858, for the effectual regulation of the said market when removed as aforesaid.”

27. Pursuant to these resolutions, on the 8th of February, 1861, the town council and local board issued the following notice:—

*“Removal of the market. Borough of Bridgnorth.

*69] “Notice is hereby given, that the mayor, aldermen, and burgesses of the borough of Bridgnorth, acting by the council of the said borough in pursuance of all powers vested in them as owners of the markets of Bridgnorth, and lords of the manor, and as local board of health under the Local Government Act, 1858, and the acts incorporated therewith, and of all other powers (if any) vested in them, have, for the purpose of holding the market established in the town and borough of Bridgnorth, and heretofore holden under the town-hall and in the High Street of the said town, provided a covered market-place situate at the south end of High Street and at the east end of Listley Street, in the said town and borough, and duly certified by two justices of the peace for the said town and borough as complete and fit for the use of the persons resorting thereto, and will on Saturday, the 23d instant, remove the market so established and holden as aforesaid to such covered market-place, and such market will be then opened, held, and established for the public use, and continued on that and every succeeding Saturday at such new market-place, but so as not to interfere with any rights, powers, or privileges within the said borough, which, under the 50th section of the Local Government Act, 1858, ought not to be interfered with; and that, after such opening of the said covered market-place for such use as aforesaid, every person other than a licensed hawker, or any person entitled to any such rights, powers, or privileges as aforesaid, who shall sell or expose for sale in any place within the said town and borough except in his or her own dwelling-house or shop, any article in respect of which tolls are from time to time authorized to be taken in the said new market-place, will

*70] be liable for every offence to a penalty not exceeding *40s.: And further take notice, that, although it is not at present intended

to prevent those occupiers of houses in the High Street of the said town and borough who have of late years been in the habit of erecting on market-days standings opposite their respective houses from erecting the same for the display and sale of their own merchandise, other persons cannot be allowed to display or sell their merchandise in such standings.

JOHN SMITH, Town-clerk and

clerk to the local board of health."

28. After the said notice, the local board opened the new market-buildings on the 23d of February, 1861, and have continued to keep them open on market-days, and have kept a market-clerk in attendance, and have received through him tolls and rents from persons using the market, and have applied the same according to the terms of the lease.

29. The defendants, except as hereinbefore appears, in no way interrupted or interfered with the plaintiff's stalls or standings in the High Street; and the persons to whom he let them continued to erect and occupy them without any hindrance or obstruction whatever, on market-days, down to the time of the commencement of the present action as theretofore they had done: but the effect of opening the new market was, to withdraw from the old market many of the public who would otherwise have attended it.

30. Neither the company nor the local board have purchased or taken on lease, or offered to purchase or take on lease, the supposed right of the plaintiff; nor have they or either of them obtained nor has the plaintiff given his consent to the establishing of the aforesaid new market.

The question for the opinion of the court was, whether the plaintiff had, under the circumstances *above stated, a right to maintain this action against the defendants in respect of any one or more [*71 and which of the counts in the declaration, subject to amendment as aforesaid.

If in the opinion of the court the plaintiff was entitled to succeed in the action upon any one or more of the counts, judgment was to be entered for the plaintiff upon such count or counts for 5*l.* 5*s.* damages, together with costs, and for the defendants upon the residue of such counts, with their costs in respect thereof: but, if in the opinion of the court the defendants were entitled to succeed, judgment was to be entered for the defendants, with costs.

Huddleston, Q. C. (with whom was *Gray*) for the plaintiff.—The corporation were not justified in removing the market and thus depriving the plaintiff of the privilege he was entitled to enjoy: the franchise will be forfeited by disuse or by holding it otherwise than in the accustomed place: *Dixon v. Robinson*, 3 Mod. 107. The market must be held within the precincts named in the grant: *Curwen v. Salkeld*, 3 East 538. In *The King v. Starkey*, 7 Ad. & E. 95 (E. C. L. R. vol. 34), 2 N. & P. 169, B., being entitled to a market in the borough of Keighley, which was held in the public street on B.'s soil, removed it to another site in Keighley, which site he had demised, without demising the franchise, for a term of years. It was held by the whole Court of King's Bench that the removal was bad, unless the public had the same privilege in the new market as in the old; and therefore, it appearing that no toll had ever been taken in the

old market, but that the lease, after a covenant by the lessees to allow the soil to be used solely for the market, empowered them to impose rents at their discretion for the liberty of selling in the market,—the *72] court held that the *removal was bad, and that the site of the old market on the King's highway might be used on market-days as it was before the removal. [ERLE, C. J.—That case decides no more than that no nuisance was created by continuing to resort to the old market.] The reason assigned is that the removal was illegal. If the charter under which this market in High Street was originally established had been forthcoming, it would have been competent to the owners of the market (in the absence of any grant of a special franchise to the occupiers of the adjoining houses) to remove it to any convenient place within the limits defined by the grant: but, the charter not being forthcoming, and there being evidence that the market has never within living memory been held elsewhere than in the High Street, it will be presumed that the grant is for that place only. The place to which the market is removed is not the soil of the corporation: the legal estate is in Cooper. And the rights given to the public in the new market are more restricted than those which they enjoyed in the old one; for, tolls are imposed there upon persons and things which in the old market were toll-free. That the plaintiff would have a right of action for obstructing the access of customers to his stall, is clear from *Rose v. Groves*, 5 M. & G. 613 (E. C. L. R. vol. 44), 6 Scott N. R. 645. [WILLIAMS, J.—This is more like the case of a man claiming a pew in a church as appurtenant to his house. WILLES, J.—Or like the grantor of a several fishery letting off all the water. ERLE, C. J., referred to the opinions of the judges on the Islington Market Bill, 12 M. & W. 20, (b) and also to the Local Government Act, 21 & 22 Vict. c. 98, s. 50, which empowers the local board to provide market-places, and construct market-houses and other conveniences for the purpose of holding markets.] But the section goes on to provide that “no market shall be established in *73] *pursuance of this section so as to interfere with any rights, powers, or privileges, enjoyed within the district by any person, &c., without his or their consent.” Here is a right in the plaintiff which the new market does materially interfere with. [WILLIAMS, J., referred to *The King v. Cotterill*, 1 B. & Ald. 67. There King Charles the Second, by charter, granted to the corporation of Walsall two fairs to be holden annually within the borough and foreign, and confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor: it appeared that a market had been holden immemorially in the High Street of Walsall until a very late period, when the corporation, finding it inconvenient, removed it out of the High Street to another and more convenient place within the borough: the corporation had exercised acts of ownership in pulling down an old market-house and erecting a new one: the clerk of the markets, however, had been appointed by the lord of the manor, but he did not receive any toll from the persons frequenting it. The defendant having been indicted for a nuisance in erecting stalls in the High Street after the removal of the market, the judge, upon the trial, left it to the jury to say whether the corporation were owners of this market, adding, that, if they were, the right

of removal (to a convenient place within the borough) was incident to the grant. The jury having found in the affirmative, the court refused to grant a new trial.] All claims which are founded on custom must be reasonable: *Tyson v. Smith*, 9 Ad. & E. 406 (E. C. L. R. vol. 36), 1 N. & P. 784: there is nothing unreasonable in that which the plaintiff here claims as appurtenant to his house.

Phipson (with whom was *Dowdeswell*), contrâ.—Primâ facie it is competent to the owner of a market *to remove it to a more convenient spot within the limits of the grant or presumed grant. [*74 This is clear from *The King v. Cotterill*, 1 B. & Ald. 67. And in *De Rutzen v. Lloyd*, 5 Ad. & E. 456 (E. C. L. R. vol. 31), 6 N. & M. 776, in case by the lord of a manor for disturbance of a market, it was held, that, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only; but that a jury may presume, from circumstances, that the market was granted to be holden at any convenient place within the manor. Assuming, however, that there was no valid removal of the market here, what franchise had the plaintiff the infringement of which he complains of? He could only have it by virtue of some grant: *The Mayor of Northampton v. Ward*, 1 Wils. 107; *Lockwood v. Wood*, 6 Q. B. 31 (E. C. L. R. vol. 51). [WILLIAMS, J.—If the owner of a market in the streets of a town covenanted with the owners of the houses adjoining that they might have stalls there on market-days for the sale of their commodities, and then removed the market to another place, would not that be derogating from his grant? It would be something like the case of a man granting estovers, and then grubbing up the wood.] A man cannot have a stall in a market as appurtenant to his house,—at all events, in the manner claimed here. In *Jones v. Richard*, 6 Ad. & E. 530 (E. C. L. R. vol. 33), tenant of B., prescribed to have for himself and his tenants, &c., occupiers of the farm of B. *the sole and exclusive right of pasture and feeding of sheep and lambs on L., as to the said farm of B. belonging and appertaining*: it was held that this did not entitle him to take in the sheep and lambs of other persons to pasture on L., for that by the terms of the grant some interest in the pasture was reserved to the lord, and the above practice was prejudicial to such *interest. To be good, a grant must be certain as well as reasonable: *Comyns's Digest, Grant* (E. 14); *Bacon's Abridgment, Grants* (H.); *Clayton v. Corby*, 5 Q. B. 415 (E. C. L. R. vol. 48), 2 Gale & D. 174. No trace is to be found in any of the books of an action ever having been brought for the invasion of such a right as this: it cannot be claimed as incident to land.

Huddleston, in reply.—In *Rolle's Abridgment, Nusans* (G), pl. 2, it is said: "Si home levie un market ou un faire d'estre tenus mesme le jour que mon faire ou market est tenus, en un vill que est prochein a mon faire ou market, per que mon faire ou market est empaier, ceo est un nusans al mon market ou faire, car le grant del Roy de tiel faires ou markets est tous foits ove un clause que ceo ne serra al nusans d'auter faire ou market,"—citing the *Year Books* 22 H. 6, fo. 14 b, 11 H. 4, fo. 47 b, 41 E. 3, fo. 24 b. And see *Yard v. Ford*, 2 Wms. Saund. 172, and the authorities cited in the notes thereto. A C. B. N. S., VOL. XV.—5

stall in a market held as this market was, may well be claimed as appurtenant to a house, as may a pew in a church: *Stocks v. Booth*, 1 T. R. 428; Co. Litt. 121 b. In Stephen's Commentaries, 4th edit. 664, treating of fairs and markets, it is said, that, "when any of the privileges in question can be shown to exist, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll where it is due, but against those also who disturb his franchise by setting up a new fair, market, or ferry so near to his as to diminish his custom,"—citing Rolle's Abridgment, *Nusans* (G.), pl. 2, Comyns's Digest, *Action upon the Case for a Nuisance* (A.) 8, *Blissett v. Hart*, Willes 503, *De Rutzen v. Lloyd*, 5 Ad. & E. 456 (E. C. L. R. vol. 31), 6 N. & M. 776, *Bridgland v. Shapter*, 5 M. & W. 375, *Pim v. Curell*, 6 M. & W. 234. *Cur. adv. vult.*

*76] *WILLIAMS, J., delivered the judgment of the court:—We are of opinion that our judgment ought to be for the plaintiff. He claims a right of placing a stall for the sale of goods by himself or his licensees, on market-days, in front of his shop in a market held in the High Street of the borough of Bridgnorth, as appurtenant to his house situate in that street: and his complaint is, that he has been disturbed in the enjoyment of this right by the defendants holding on market-days another market near the market in which the right is so claimed by the plaintiff.

The facts are, that, from time immemorial till lately, a weekly market has been held in the High Street of Bridgnorth. The market belongs to the corporation of Bridgnorth, who are also lords of the manor in which the borough is situate. The plaintiff is the owner and occupier of a house in the High Street; and he and the previous owners and occupiers of this house, as well as several other occupiers of houses in the High Street, have from time immemorial erected on market-days stalls opposite their respective houses, and have exposed thereon goods for sale in the market, or let the stalls for hire to other persons who have done so: and no payment has ever been made or claimed by the corporation for stallage or for tolls of things sold at such stalls, though they took tolls of similar produce exposed in the market elsewhere.

The defendants have moved the market to another place within the town, at some small distance from the High Street, which would be necessarily injurious to the old market if it was continued, and to the right claimed by the plaintiff therein.

But the demand for compensation in respect of this injury is resisted,—first, on the ground that the moving of the market is justifiable under the Public Health Act, 1848, 11 & 12 Vict. c. 63, and the *77] Local Government Act, 1858, 21 & 22 Vict. c. 98,—secondly, that there is no legal foundation for any right of plaintiff which is interfered with by the removal of the market from the High Street to its new site, and no cause of action in respect of such removal.

It appears to us, that, inasmuch as the power as to providing market-places conferred on the local board by s. 50 of the Local Government Act, 1858, is expressly qualified by the provision that no market shall be established so as to interfere with any rights enjoyed by any person without his consent, the two questions raised on the part of the defendants may be narrowed to the single one, whether the

plaintiff has shown that the removal of the market was an unlawful interference with any right then enjoyed by him.

No authority in any way referring to such a right was cited by counsel on the argument of this case; nor has the court been able to discover any. It is therefore necessary to consider on principle whether such a right is maintainable.

On the part of the plaintiff, the argument rests on the long-established rule, as mentioned by Lord Hobart in *Slade v. Drake*, Hob. 295, that "antiquity of time fortifies all titles, and supposeth the best beginning the law can give them." And it is urged that the immemorial enjoyment in the present case may well have had a legal origin, on the supposition either that at some former period the then owners of the market granted to the respective owners of the houses abutting on the High Street and their heirs, as a right annexed to their estate in the houses, that the occupiers thereof might on market-days respectively erect stalls in the Market Street opposite their houses, for the exposure of goods, free of all toll and stallage; or that the original grant of the franchise from the Crown to the corporation was expressed to be on the terms or *condition that the owners [*78 of those houses should enjoy that right.

We think these arguments are well founded, and ought to prevail.

This right was probably conferred in consideration that the holding of the market must necessarily diminish on market-days the trade and custom of the shops kept in such houses, and the shopkeepers were therefore privileged to advance, as it were, their shops into the market itself, by having stalls in the street commensurate with the fronts of their houses. And in this point of view the enjoyment of the stalls by them and those licensed by them appears to us sufficiently connected with the enjoyment of the houses to satisfy the unquestionable rule of law,—which was acted on by this court in *Ackroyd v. Smith*, 10 C. B. 164 (E. C. L. R. vol. 70), and *Bailey v. Stephens*, 12 C. B. N. S. 91 (E. C. L. R. vol. 104),—that no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof.

On the part of the defendants, besides denying that any such right could have a legal existence, it was urged, that, even if the right existed in respect of erecting such stalls in the High Street as long as the market was held there, yet that they, as owners of the market, might legally remove it to any new place within the manor, and that, in respect of such new site, the right was annihilated. The cases of *Curwen v. Salkeld*, 3 East 538, *The King v. Cotterill*, 1 B. & Ald. 67, and *De Rutzen v. Lloyd*, 5 Ad. & E. 456 (E. L. C. R. vol. 31), 6 N. & M. 776, certainly justify the proposition, that, if nothing further appeared in the case, the presumption would be that the original grant from the Crown was for the holding of the market at any convenient place in the manor, and that, accordingly, the owners of the franchise in the present case might change the site of it, as they have in fact done.

*But the answer to this argument is, that if the right of the plaintiff had its origin, as suggested, in a grant from the owners [*79 of the market, their successors cannot be allowed to derogate from that grant by changing the site of the market-place: or, if the right

had its origin, as further supposed, in a condition contained in the grant by the Crown of the franchise, the terms of that condition would in effect amount to a grant of a market to be held in the High Street and in no other place, and consequently the removal of it by the defendants to the new site would be illegal. If this be so, then, according to the case of *The King v. Starkey*, 7 Ad. & E. 95 (E. C. L. R. vol. 34), 2 N. & P. 169, the High Street continues to be, in point of law, the site of the market, and the plaintiff may maintain this action for setting up a new market to the injury of his right in the ancient market.

Our judgment, for these reasons, must be for the plaintiff.

Judgment for the plaintiff.

BERKLEY v. SHAFTO. June 23.

By deed of 1857, A., who was tenant for life under the will of one S., conveyed (under a power) land to B. in fee, with a reservation out of the grant of "all and every the seam or seams of coal and other minerals under the said hereditaments hereby granted, with power to win, work, and carry away the same under or over any part of the said hereditaments and premises,—the said A., or the person or persons for the time being entitled thereto, and his or their assigns, paying to the said B., his heirs and assigns, compensation for any damage which he or they may sustain thereby," and a covenant by A. that he had not done or permitted any act or thing whereby the premises or the title thereto should or might be encumbered or prejudicially affected. And B. covenanted, for himself, his heirs and assigns, "that the said hereditaments and premises hereby conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible matter, or for the purpose of any offensive trade or business, the side walls to be not less than 18 feet high, and to be in uniformity with the street," &c.

In 1844, S., A.'s testator, had demised to C. and D. "a colliery and coal-mines and seams of coal, as well opened as not opened" (including and comprising all seams of coal under the land conveyed by the deed of 1857), with full power to the lessees, their executors, administrators, and assigns, to win, work, and carry away the said seams of coal for a term of years not yet expired.

The plaintiff became possessed of the land comprised in the deed of 1857, and built four houses thereon: and, whilst he was so possessed, the houses were injured by the working and carrying away by the assignees under the lease of 1844 of the seams of coal thereunder. He thereupon brought an action against A., claiming compensation under the reservation contained in the deed of 1857.

The defendant (A.) pleaded severally,—as to so much of the count as related to the damage and injury done to the part of the said piece of ground on which the said houses were built, and to the said houses, and to the compensation claimed by the plaintiff in respect thereof,—that such damages and injury were occasioned by reason of the said houses having been erected thereon:—

Held, that the compensation clause in the deed of 1857 extended to houses thereafter built upon the land, and consequently that the seventh plea was no answer to the declaration.

THE declaration stated that a deed was made by and between the defendant, being the party thereto of the second part, and the other *80] persons therein mentioned *and which said deed was signed and sealed by the defendant, and his consent therein contained and expressed was attested by two credible witnesses, and was and is of the tenor and in the words and figures following, that is to say,—
 "This indenture, made the 13th of February, 1857, between John Eden, of, &c., and the Rev. J. D. Shafto, of, &c., of the first part, R. D. Shafto, of, &c., of the second part, and R. Robinson, of, &c., of the third part: Whereas R. E. D. Shafto, late of Whitworth Park, by his

will dated the 21st of October, 1842, gave and devised the hereditaments and premises hereinafter conveyed (inter alia) to the said John Eden (then and therein called John Methold) and the said J. D. Shafto and their heirs, to the uses and upon the trusts thereafter declared, viz. to the use that his wife, C. D. Shafto, should receive thereout a rent-charge or annuity of 1300*l.*; and, subject thereto, to the use of the said John Eden and J. D. Shafto, their executors, administrators, and assigns, for the term of 2000 years, upon the trusts thereafter declared, and which in no way affect these presents; and, from and immediately after the determination thereof, to the use of the said *R. D. Shafto, party hereto, and his assigns, for his natural life, [*81 without impeachment for waste; with remainder to the use of trustees therein described, their heirs and assigns, during the life of the said R. D. Shafto, upon trust to preserve contingent remainders; with remainder to the use of the first and every other the sons of the said R. D. Shafto lawfully to be begotten, one after another, as they should be in priority of birth, and the heirs of their bodies respectively issuing, with divers remainders over: And the said testator by his said will declared that it should be lawful for the said John Eden (therein called John Methold) and J. D. Shafto, with the consent and approbation of such of his children or grandchildren, or other the person who by virtue of the uses and limitations therein contained and hereinbefore partly recited should be entitled to the first estate of freehold or inheritance in possession of and in the manors, hereditaments, and premises hereinbefore devised, or any part thereof respectively,—such child or children, grandchild or grandchildren, or other person as aforesaid, being then of the full age of twenty-one years,—such consent or approbation to be signified by any writing or writings under the hand and seal of the person or persons whose consent was thereby made requisite, and to be attested by two or more credible witnesses, absolutely to sell and dispose of all or any part of the said manors, hereditaments, and premises (other than and excepting his capital messuage at Whitworth aforesaid, with the appurtenances thereunto belonging, and the lands and grounds usually held and enjoyed by him the said testator along with the same capital messuage), unto any person or persons whomsoever, either together or in parcels, for such price or prices as to the said John Eden (therein called John Methold) and J. D. Shafto should seem *reasonable, and upon payment of the purchase-money to sign and give [*82 proper receipts for the same, which should be sufficient discharges to the purchaser or purchasers for the money therein expressed to have been received, and such purchaser or purchasers shall not afterwards be answerable or accountable for any loss, misapplication, or non-application thereof: And it was declared that the premises so sold should be for ever freed and discharged from all and every the uses, estates, trusts, limitations, powers, and provisos therein declared: And whereas the said testator died on or about the 19th of January, 1848, leaving the said R. D. Shafto (party hereto), his eldest son, and tenant-for-life of the manors, hereditaments, and premises devised by the said recited will, and who has long since attained the age of twenty-one years: And whereas the said John Eden has long since the death of the said testator, by Royal license and authority, assumed

the surname of Eden in lieu of the surname of Methold: And whereas the said John Eden and J. D. Shafto contracted and agreed with the said R. Robinson for the absolute sale to him of the piece or parcel of ground hereinafter more particularly described and intended to be hereby conveyed, and the fee-simple thereof in possession, for the price or sum of 225*l.*, which said piece or parcel of ground forms portion of the lands and hereditaments devised by the said recited will of the said R. E. D. Shafto, but no portion of the lands and grounds usually held and occupied by the said R. E. D. Shafto along with the said capital messuage at Whitworth aforesaid: Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of 225*l.* sterling this day paid by the said R. Robinson to the said John Eden and J. D. Shafto, the receipt whereof is hereby by them respectively

*83] acknowledged, they the said John Eden and J. D. Shafto, in exercise of the power and authority so given to them by the said recited will as aforesaid, do and each of them doth (with the consent and approbation of the said R. D. Shafto, testified by his being party to and signing and sealing these presents, such signature and sealing being attested by two witnesses) grant, release, and convey unto the said R. Robinson and his heirs all that piece or parcel of ground situate at or near to the village of Spennymoor, in the county of Durham, containing in length from east to west 330 feet or thereabouts, and in breadth from north to south 42 feet or thereabouts, and containing in the whole 1540 square yards or thereabouts, and which said piece or parcel of ground is bounded on or towards the east and north by land belonging to the vendors, on or towards the west by land belonging to G. Beedall, and on or towards the south by George Street, together with the rights, members, and appurtenances thereunto belonging, &c.; except and always reserved out of these presents all and every the seam or seams of coal and other minerals under the said hereditaments hereby granted, with power to win, work, and carry away the same under or over any part of the said hereditaments and premises,—the said R. D. Shafto, or the person or persons for the time being entitled thereto, and his and their assigns, paying to the said R. Robinson, his heirs and assigns, reasonable compensation for any damage which he or they may sustain thereby,—To have and to hold the same unto the said R. Robinson, his heirs and assigns, to the use of the said R. Robinson, his heirs and assigns, for ever: And the said R. Robinson hereby declares that no woman who shall become his widow shall be entitled to dower out of the said hereditaments and

*84] premises: And each of them the said John Eden and *J. D. Shafto, so far only as relates to his own acts and deeds, hereby for himself, his heirs, executors, and administrators, covenants with the said R. Robinson, his heirs and assigns, that they respectively have not done or permitted any act or thing whatsoever whereby the said hereditaments and premises intended to be hereby conveyed, or the title thereto, can, shall, or may be encumbered or prejudicially affected in any way howsoever: And the said R. D. Shafto hereby, for himself, his heirs, executors, and administrators, covenants with the said R. Robinson, his heirs and assigns, that, notwithstanding any act done by him the said R. D. Shafto, or the said R. E. D. Shafto, deceased,

to the contrary, they the said John Eden and J. D. Shafto, or one of them, now have in themselves, or has in himself, good right, full power, and lawful and absolute authority by these presents to grant and release the said hereditaments and premises to the uses and in the manner aforesaid, according to the true intent and meaning of these presents [Covenants for further assurance, for production of title deeds, &c.]: And that free from all encumbrances whatsoever created or occasioned by him the said R. D. Shafto or any of his ancestors or testators, or any other person whomsoever rightfully claiming under him or them: And the said R. Robinson, for himself, his heirs and assigns, hereby covenants with the said R. D. Shafto and his assigns and the person or persons who for the time being shall be entitled under the limitations contained in the hereinbefore in part recited will of the said R. D. Shafto to an estate of freehold in the said Whitworth estate, and his and their assigns, that the said hereditaments and premises hereby conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible *matter, or for the [*85 purposes of any offensive trade or business, the side walls to be not less than 18 feet high, and to be in uniformity with the street, the windows to be 4 feet wide and 5 feet 6 inches in height; and further, that he or they will as soon as conveniently may be hereafter make and for ever hereafter maintain on the piece or parcel of ground intended to be hereby conveyed in the front of the dwelling-house or shop now or hereafter to be built thereon, a footway or pathway to be open at all times for the passage of all persons on foot, such footway or pathway to be of the width of 4 feet at the least, and will at his or their own expense cause the same to be flagged and keep such flagging at all times hereafter in good repair and free from all obstructions whatsoever, which said pathway shall be made uniformly to suit the general fall in the street, and will pay his proportion of the costs and expenses of draining, sweeping, or otherwise cleaning the street or streets, or intended street or streets in which the premises hereby conveyed, and erections now or hereafter to be built thereon, shall be situate, and shall erect boundary walls not less than 7 feet in height, and shall not put out windows to overlook the adjoining properties. In witness," &c. Averment, that after the making of the said deed, and while the estate and interest thereby conveyed to the said R. Robinson continued to be and remained vested in him by virtue of the said deed, certain messuages and dwelling-houses, to wit, Nos. 101, 102, 103, and 104, George Street, Spennymoor, were erected and built on the said piece of ground so conveyed to him; and afterwards and while the said estate and interest so continued to be and remained vested in him by virtue of the said deed, he, by deed between him and W. Oliver, dated the 12th of May, 1857, granted, released, and *conveyed unto the said W. Oliver and his heirs, all the said [*86 four messuages and dwelling-houses so as aforesaid erected upon the said piece of ground, together with all and singular his estate, right, title, &c., of, in, or to the same, to hold the same and all the premises thereinbefore in the said deed described and expressed to be thereby conveyed, with their appurtenances, unto and to the use of the said W. Oliver, his heirs and assigns, for ever: That afterwards,

and while the same estate and interest conveyed by the said last-mentioned deed to the said W. Oliver continued to be and remained vested in him by virtue of the premises, the said W. Oliver, by deed between him and the plaintiff, dated the 13th of May, 1857, granted, released, and conveyed the said messuages and dwelling-houses, with the yards, out-offices, and conveniences thereto belonging, to the plaintiff and his heirs, to hold the same to the use of the plaintiff, his heirs and assigns, for ever: That, before the making of the herein first named and above set forth deed, the said R. E. D. Shafto, by deed dated the 12th of September, 1844, between him of the one part and T. Brown and W. C. Gillan of the other part, granted, demised, and leased unto the said T. Brown and W. C. Gillan, their executors, administrators, and assigns, a colliery and coal-mines and seams of coal, as well opened as not opened, including and comprising all seams of coal extending, reaching, or being under the said piece of ground and the said four messuages and dwelling-houses so as aforesaid conveyed to the plaintiff, with full power to the said T. Brown and W. C. Gillan, their executors, administrators, and assigns, to win, work, and carry away the said seams of coal, for a term of years not yet expired: That, after the making of the said last deed of conveyance by the said *87] W. Oliver to him the plaintiff, and while the same *estate and

interest thereby conveyed to him the plaintiff of and in the said messuages and dwelling-houses continued to be vested in him the plaintiff in possession by virtue of the said deed, and before this action, the said messuages and dwelling-houses were injured and damaged, and the plaintiff sustained damage thereto, by *[such] winning, working, and carrying away, to wit, by the said lessees of the said R. E. D. Shafto, or his assigns (a) of seams and parts of seams of coal, which seams extended, reached, and were under the said piece of ground above mentioned, and which sustained and supported the said piece of ground and the said messuages and dwelling-houses: That, by such winning, working, and carrying away, the foundations of the said messuages and dwelling-houses were weakened, cracked, injured, and caused to subside and sway, and to be dilapidated and less fit for habitation and uninhabitable, and the plaintiff lost the rents and profits which otherwise he would have derived from the said messuages and dwelling-houses, and the same have, by reason of the premises, been diminished in value and rendered worthless, whereof the defendant had notice: And that, although plaintiff had done all things, and all things had happened, and all times had elapsed, to entitle the plaintiff to maintain this action, and to be compensated by the defendant for the damage aforesaid: Yet that no compensation had been paid to the plaintiff for the said damages.*

The defendant demurred to this declaration; the ground of demurrer stated in the margin being, "that the defendant is not liable under the covenant to pay compensation for the damage alleged in the declaration; and that the defendant is not shown in the declaration to have done such damage." Joinder.

*88] *Sixth plea, to the first count, so far as it relates to the cause of action in the said first count mentioned in respect to the winning and working therein alleged, and so far as the same relates to the

(a) Struck out on argument: vide post, p. 95.

injury and damage occasioned and sustained thereby, and as to the compensation for the same, and as to so much of the said first count as charges the defendant with not having paid such compensation,—that such winning and working was not done in pursuance of or under and by virtue of the indenture in the declaration alleged to have been made by the said R. E. D. Shafto, dated September 12th, 1844, or under and by virtue or in pursuance of any of the powers or authorities therein contained, and was not done by the defendant or by any person by his authority or direction, or for whose act or acts he was or is responsible.

The plaintiff demurred to the sixth plea, on the ground that it raised an immaterial issue. Joinder.

Seventh plea, as to so much of the first count as relates to the damage and injury done to the part of the said piece of ground on which the said messuages and dwelling-houses were erected and built and stood, and to the said messuages and dwelling-houses, and to the compensation claimed by the plaintiff in respect thereof,—that such damage and injury were occasioned by reason of the said messuages and dwelling-houses having been so erected thereon.

The plaintiff demurred to the seventh plea; the ground of demurrer stated in the margin being “that the compensation clause in the deed of 1857 extends to houses built afterwards; and that the plea does not show that but for the working of the mines the damage would not have occurred.” Joinder.

Manisty. Q. C. (with whom was *T. E. Chitty*), for the plaintiff. [*89] (a)—[WILLIAMS, J.—The defence set up is twofold,—first, that the acts complained of were authorized by the lease,—secondly, that the injury was occasioned by the building of the houses.] It appears from the declaration, that the testator, on the 12th of September, 1844, granted a lease of the minerals under the land in question to persons named Brown and Gillan; that he died in 1848, having by his will devised his estate to trustees to the use of the defendant for life, with remainders over, with a power of sale in the trustees, with the consent of the person for the time being entitled to the fee; that, in February, 1857, the trustees, with the consent of the defendant, under the power, conveyed the piece of land in question to Robinson in fee, *for building purposes*, reserving the mines and minerals, “with power to win, work, and carry away the same under or over any part of the said hereditaments and premises,” the defendant, or the person or persons for the time being entitled thereto, and his and their assigns, paying to Robinson, his heirs and assigns, compensation for any damage which he or they might sustain thereby; and that Robinson

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the first count is good, and fixes the defendant with liability under the compensation clause for the damage done to the plaintiff’s houses by the working of the mines.—2. That the sixth plea raises immaterial issues.—3. That the covenant is absolute to pay for damage by the working of the mines, by whomsoever worked.—4. That the question whether the mines were worked under the defendant’s authority is irrelevant.—5. That the sixth plea is not saved by the allegations of matter of law contained in it.—6. That the seventh plea raises an immaterial issue.—7. That the compensation clause extends to damage to houses built after the date of the deed.—8. That the eighth plea admits the damage by working the mines, and the alleged occasion of the damage is immaterial.”

*90] afterwards *conveyed to persons under whom the plaintiff claims. It is submitted that this is a covenant the benefit of which runs with the land, and that the declaration sufficiently shows that the acts in respect of which compensation is claimed have been done by persons for whose acts the defendant is answerable, viz., the lessees of the testator, or their assigns. It is true the declaration does not in terms allege that the lease authorized the working of the mines under the land in question: but it must be assumed that the working was right-ful, until the contrary is shown. The plaintiff would have no remedy against the lessees or their assigns, unless he could show them to be wrongdoers. The question is, whether the compensation which the defendant is to pay under his covenant, is limited to surface damage. The sixth plea probably means to allege that the acts complained of were the acts of wrongdoers; but it is not so stated. Nor does the seventh plea afford any answer to the declaration. [WILLIAMS, J.—Does not the declaration confine the complaint to acts done under the lease?] It is submitted that it does not. [WILLIAMS, J.—Then why mention the lease?] It was necessary to set out the lease, in order to explain the breach. [BYLES, J.—The sixth plea is equivalent to an allegation that the acts complained of were done by a stranger.] The seventh plea is clearly bad: the deed of 1857 evidently contemplates that there shall be houses built upon the land.

*91] *Quain, contra.*(a)—The first count is clearly bad: *the only breach assigned, is, non-payment of compensation for damage. The count shows that the injury complained of is, injury to the surface of the land by letting it down and so damaging the plaintiff's buildings. It is submitted that that is not a damage within the compensation clause; but that the plaintiff must seek his remedy by an action upon the case against the person who did the mischief. The compensation contemplated by the deed, is to be for something done in pursuance of the reservation: but the declaration does not show that the damage complained of is the lawful winning and working of the coal under that reservation. A leading case upon this subject is *Harris v. Ryding*, 5 M. & W. 60. There, A., being seised in fee of certain lands, granted them to P., his heirs and assigns, reserving to himself, his heirs and assigns, "all and all manner of coals, seams and veins of coal, iron-ore, and all other mines, minerals, and metals which then were or at any time and from time to time thereafter should be discovered in or upon the said premises, &c., with free liberty of ingress, egress, and regress to come into and upon the premises, to dig, delve, search for, and get, &c., the said mines and every part thereof, and to sell and dispose of, take, and convey away the same, at their free will and pleasure, and also to sink shafts, &c., making a fair compensation to P. for the damage to be done to the surface of the premises, and the pasture and crops growing thereon." It was held, that, under this reservation, A. was not entitled to take all the mines, but only so much as he could get, leaving a *reasonable* support to the surface. Parke, B., in the course of the argument, observes,—“The

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That it is not shown by the declaration that any damage has been done by any of the persons for whose acts the defendant has covenanted to make compensation,—2. That he is not liable for the damage occasioned by the houses, &c., being put upon the land.”

clause as to compensation means for damage done by exercising the powers reserved. This is case for working the mines in an unreasonable manner. If you work the mine in an unreasonable *manner, it is not within the clause." And, in giving judgment, he [*92 says: "The rule of law is, that a reservation is to be construed strictly: still, however, it would reserve to the grantor all that was not conveyed by the grant, provided the meaning and intention of the parties be clear. What then is the meaning and intention of the parties here? It is clearly the meaning and intention of the grantor that the surface shall be fully and beneficially held and enjoyed by the grantee, he reserving to himself all the mines and veins of coal and iron-ore below. By reasonable intendment, therefore, the grantor can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface according to the true intent of the parties to the deed, that is, he only reserves to himself so much of the mines and minerals as could be got, leaving a reasonable support to the surface." [WILLIAMS, J.—That case is also an authority to show that the compensation clause only gives a cumulative remedy.] *Smart v. Morton*, 5 Ellis & B. 30, is a very similar case. [WILLIAMS, J.—If a man covenants to pay compensation for damage resulting from what he properly does, does he not à fortiori covenant to pay compensation for what he improperly does?] The result of all the cases,—*Roberts v. Haines*, 6 Ellis & B. 643 (E. C. L. R. vol. 88), (in error, *Haines*, app., *Roberts*, resp., 7 Ellis & B. 625 (E. C. L. R. vol. 90)), *Robotham v. Wilson*, 8 Ellis & B. 123 (E. C. L. R. vol. 92), 8 House of Lords Cases 348, *Bonomi v. Backhouse*, E. B. & E. 642, *Backhouse v. Bonomi*, 9 House of Lords Cases 503,—is, that a reservation of a power to work mines and minerals does not authorize a working so as to destroy the support of the surface; and that the defendant's liability is confined to compensation for such acts as he or those for whose acts he is responsible may do by virtue of the reservation. The next question is as to the person by whom the *injury is to be committed. The action is not founded upon the lease, but exclu- [*93 sively on the reservation in the original grant: the lease is introduced merely for the purpose of showing by whom the injury was committed. The reservation in the deed is,—“except and always reserved out of these presents all and every the seam and seams of coal and other minerals under the said hereditaments hereby granted, with power to win, work, and carry away the same under or over any part of the said hereditaments and premises; the said R. D. Shafto or the person or persons for the time being entitled thereto, and his and their assigns, paying to the said R. Robinson (the lessee), his heirs and assigns, reasonable compensation for any damage which he or they may sustain thereby.” To assign a good breach of that covenant, the declaration must aver a working of the mines by R. D. Shafto or the person or persons for the time being entitled thereto: whereas, it is consistent with what is here alleged that the injury complained of was done by a perfect stranger; there is no allegation that the working was pursuant to the reservation in the deed of 1857, or pursuant to the lease. [BYLES, J.—May this be treated as a count in tort?] It is submitted not; for, in that case, it must be shown that the injury was done by the defendant or by some person with his privity and by his

authority. [BYLES, J.—You say that workings without the power are wrongs; and that the defendant is liable for lawful workings, but not for wrongs.] Precisely so: the authorities show that the wrongdoer is the only person liable. The 7th plea addresses itself to the suggestion that the land in question was conveyed for building purposes. Since the case of *The Caledonian Railway Company*, app., *94] *Sprot*, resp., 2 Macq. 449, (a) it cannot be denied *that, if this had been a grant of land expressly for building purposes, there would have been an implied grant of the land together with the buildings to be erected upon it. Here, however, there is no express grant for building purposes; no covenant to build. The plaintiff relies on the collateral covenant by the grantee that the hereditaments and premises conveyed by the deed, “or any buildings now or hereafter to be erected thereon,” shall not be used for certain purposes. The obvious meaning of that, is, that, if the grantee shall hereafter choose to use the land for building purposes, he shall not thereby create a nuisance. [WILLIAMS, J.—There is abundant evidence on the face of the deed that the parties contemplated that the land would be built upon.] That will not bring the case within *The Caledonian Railway Company*, app., *Sprot*, resp. There, the company could not use the land for any other purpose than the construction of their railway. The plea is clearly good, within the cases of *Brown v. Robins*, 4 Hurlst. & N. 186, and *Stroylan v. Knowles*, 6 Hurlst. & N. 454. In the last-mentioned case it was held, that, where the working of mines, in how- *95] ever careful *a manner, has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damage to buildings thereon, although erected within twenty years, *provided their weight did not contribute to the subsidence*.

Manisty, Q. C., in reply.—The question is narrowed to this,—whether there was a rightful or a wrongful working of the mines by the lessees or their assigns: if the former, it is conceded that the defendant is liable; but, if the latter, it is contended that he is not. Vice-Chancellor Wood decided yesterday, in a suit by the tenant for life to restrain the lessees from working the mines so as to disturb the surface, that they were not only entitled but bound to work out *all* the coal, irrespective of any injury that might be done to the surface. *Smart v. Morton*, 5 Ellis & B. 30, decides that you must look at the reservation to see what is a rightful and what a wrongful working. The plaintiff is no party to the deed. It is for the defendant to show, if the fact be so, that the working was wrongful. [The Court suggested that the declaration should be amended by striking out the words in italics in p. 87, and substituting the following,—“by such

(a) It was there held that a conveyance of land to a railway company for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance: and therefore, although in the conveyance to the railway company the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway. But, if I grant a meadow to A. for grazing purposes, retaining the minerals and the adjacent land, and if A., having no warranty against subsidence, thinks fit to build a house on the edge of the meadow, and the house falls, he is without remedy against me, and has himself alone to blame for the consequences. If, however, the grant were made expressly for building purposes, there would then be an implied warranty of support, both subjacent and adjacent.

And see *Elliot v. The North Eastern Railway Company*, 32 Law J., Chan. 402 (in the House of Lords).

winning, working, and carrying away as in the first deed is mentioned and provided for," withdrawing the demurrer to the declaration, and substituting a traverse for the sixth plea. After some discussion, this was assented to.] The substantial question is, whether the winning and working was rightful. It may be assumed to have been done under a lease granted before the conveyance of 1857. With knowledge of the existence of the lease, the defendant chooses to convey the land with this compensation clause. The covenant will be construed with reference to the state of things at the time of the making of the deed: *Smart v. Morton*. As to *the seventh plea,—it may be [96 conceded, that, if the houses were built under an ordinary lease, and their building occasioned the subsidence, the plaintiff would have no cause of action. But it is otherwise where it is manifest on the face of the deed that it was contemplated that the land should be used for building purposes. Regard being had to the dimensions of the subject-matter of the conveyance, at the comparatively large price paid for it, and at the nature of the covenants entered into by the grantee, it is impossible to doubt that this was a grant for building purposes.

WILLIAMS, J.—I am of opinion that the declaration, as amended, is good, and the seventh plea bad, and consequently that the plaintiff is entitled to judgment. As the declaration originally stood, in conjunction with the sixth plea, some very important points were raised: and the material part of those points will arise again whenever the argument upon the traverse which is now substituted shall take place. The declaration, after setting out the purchase-deed of February, 1857, and bringing down the title to the plaintiff, proceeds to allege the damage done after his title accrued; and it states the damage in this way,—“the said messuages and dwelling-houses were injured and damaged, and the plaintiff sustained damage thereto, by such winning, working, and carrying away as in the first deed is mentioned and provided for, of seams and parts of seams of coal, which seams extended, reached, and were under the said piece of ground above mentioned, and which sustained and supported the said piece of ground and the said messuages and dwelling-houses,” &c. The amended record will contain a traverse of that averment, in lieu of the sixth plea: and the first question we have to decide, is, whether the declaration as thus amended is good. I *am of opinion that it is. There is a [97 distinct admission by the demurrer that the injury was such as formed the subject of compensation under the clause for compensation contained in the deed; and the declaration is good, unless the nature of the covenant makes such a breach repugnant and impossible. I was at first much struck with the view presented on the part of the defendant, that this was nothing more than the ordinary covenant contained in deeds where there is a separation of the mines and minerals from the surface of the land, viz. that the grantor shall have a right to win and work the minerals and to use the surface for the purpose of carrying them away, constructing works, and opening shafts, payable a reasonable compensation for surface damage. At first I was inclined to think that this was simply a covenant of that sort. But we have nothing to do with that now. Even construing the covenant in that narrow way, I cannot say that it is not possible

that the damage complained of may have been done by a winning and working of the mines by persons for whose acts the defendant is responsible. As to the seventh plea,—we are not fettered by any of the authorities cited, though the reasoning of some of them may usefully be applied to the present argument. The question is one of construction upon the surrounding circumstances appearing upon the record. The plea in effect denies that the plaintiff is entitled to compensation under the clause for compensation contained in the deed, for damage (if any) resulting from the winning and working of the minerals under the land, because such damage was occasioned by the erection of the houses thereon. It is plain, I think, from the whole tenor of the deed, that the parties did contemplate that houses would be built upon the land: it is almost treated as a certainty. It seems monstrous to say, that, where a deed contemplates the building of

*98] houses, and provides specifically for what shall be done when the houses are built, the grantee shall forfeit his claim to compensation because he has carried into effect that which was contemplated by the grant. I am clearly of opinion that the plaintiff is entitled to compensation if he has sustained damage from the working of the mines, notwithstanding his having built on the land, and consequently that the seventh plea is no answer to the declaration.

WILLES, J.—I am of the same opinion. As to the declaration, all that the court does, is, to direct that the issue shall be in the proper form for determining whether or not the acts complained of are acts which are within the compensation clause in the deed. As to the seventh plea, the question raised, is, whether the deed affords any protection in respect of injury done to the surface of the land with houses built upon it. I must admit that my mind has fluctuated during the argument on this point. The only mention of buildings is in the covenant of the vendee against using the premises so as to incur danger or create a nuisance, and has reference rather to the rights of the vendor than to those of the vendee. But, when it is pointed out that this relates to “any buildings now or hereafter to be erected” on the land, I think it must clearly be implied that the building of houses was contemplated, and that the houses to be built were entitled to support, and consequently that the damage done to them is to be compensated for.

BYLES, J.—It is unnecessary to express any opinion upon the declaration as it originally stood. The amendment, which was very properly consented to by Mr. Quain, has entirely changed its effect. The question now presented by the breach, as amended, is, whether the working of the mines which is complained of was a work-

*99] ing provided for by the deed. I cannot say that that is a bad breach, unless I am prepared to say that under no conceivable circumstances could it be a good breach. Upon this I express no opinion. But, as to the seventh plea, I entirely agree with my Brothers Willes and Willes.

Rule accordingly,—the costs to be costs in the cause.(a)

(a) At the trial the plaintiff obtained a verdict, which there was no attempt to disturb.

NELSON and Others v. COUCH and Others. *June 23.*

To constitute a good plea of *res judicata*, it must be shown that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second.

Where, therefore, the plaintiffs had under a decree of the Admiralty Court in a suit for a collision obtained the whole proceeds of the sale of the defendants' vessel,—Held, that such recovery was no bar to a subsequent action in a court of common law, the amount so recovered in the Admiralty Court being insufficient to cover the damage the plaintiffs had sustained.

THIS was an action to recover damages against the defendants for running down the plaintiffs' vessel on the high seas.

The declaration stated, that, before and at the time of the grievance thereafter mentioned, the plaintiffs were lawfully possessed of a certain ship of great value, to wit, the *Peri*, then lawfully being at sea, to wit, in the English Channel, and the defendants were also then possessed of a certain ship, to wit, the *Leo*, in the said English Channel, and then had the care, direction, and management of the same; yet that the defendants, not regarding their duty in that behalf, whilst the said ship of the plaintiffs so was in the English Channel aforesaid, took so little and such bad care of, and so carelessly, negligently, and unskilfully navigated, managed, governed, and directed the said ship of them the defendants, that the said ship, by and through the carelessness, misdirection, mismanagement, negligence, and improper conduct of the defendants *and their servants in that behalf, then [*100 with great force and violence ran foul of and struck against the said ship of the plaintiffs, and thereby then sank and swamped the same; and by means of the premises the said ship of the plaintiffs, together with all her cargo, tackle, apparel, and other furniture, goods, chattels, and effects, then on board thereof, became and was wholly lost to the plaintiffs. Claim, 1500*l*.

Second plea,—that, before the commencement of this action, the plaintiffs did in the High Court of Admiralty of England, then lawfully having jurisdiction in that behalf, duly institute a cause against the defendants' said ship *Leo* and the freight thereof, for and in respect of the matters complained of in the declaration, and for the same causes of action therein named; and thereupon the plaintiffs caused a warrant to be duly issued out of the said court, commanding the marshal of the said court and all and singular his substitutes to arrest the said ship and freight, and to keep the same under safe arrest until he or they should receive further orders, and to cite all persons who had or claimed to have any right, title, or interest in the ship or freight, to enter within six days from the service thereof (exclusive of the day of such service) in the registry of the said court an appearance in the said cause, and further commanding the said marshal and all and singular his substitutes to warn all the said persons, that, if they did not enter an appearance as aforesaid, the judge of the said court would proceed to determine the said cause, and to make such order therein as to him should seem right: that the said marshal duly arrested the said ship and freight, and executed the said warrant according to the tenor and purport thereof: that an appearance was duly entered in the said cause by and on behalf of the owners of the cargo of the said ship, and the sum of 187*l*. 5*s*. 1*d*., being *the [*101 amount of the freight of the said ship, was paid into the regis-

try of the said court: that no appearance was entered in the said cause by or on behalf of the defendants, the owners of the said ship; and thereupon such proceedings were lawfully had by the plaintiffs in the said court, that the said ship, with her tackle, apparel, and furniture, was lawfully decreed by the said court to be sold by public auction, and the proceeds thereof to be paid into the registry of the said court; and the said ship, with her tackle, apparel, and furniture, was so sold by public auction under and by virtue of the said decree for the sum of 830*l.*, and the said sum was paid into the registry of the said court; and thereupon the said cause came on for hearing before the judge of the said court, and the said judge pronounced for the damage proceeded for, condemned the proceeds of the said vessel *Leo* and freight therein, and in costs, and directed the sum of 957*l.* 4*s.* 6*d.*, being the balance of the said proceeds of the said sale and the amount of the said freight (after payment of the lawful expenses of the said marshal ordered by the said court to be paid to him the said marshal), to be paid to the plaintiffs; and the said sum was so paid out to the plaintiffs: and that all things had been done and performed, and all times had elapsed, necessary to make the said proceedings in the said Admiralty Court valid and effectual in the law, and binding upon the plaintiffs and the defendants respectively; and that the said proceedings, and every of them, were instituted by the plaintiffs, and the said decree made in favour of the plaintiffs, in respect of and concerning the same cause of action in the declaration sued on, and not otherwise.

Second replication to the second plea,—that the damages sustained by the plaintiffs by reason of the breach in the declaration mentioned, *102] greatly exceeded *the said moneys, being the balance of the proceeds of the said sale and the amount of the said freight, in the said second plea mentioned, and therein alleged to have been paid out to the plaintiffs: And the plaintiffs further said that they sued, not for the recovery of the said moneys so paid out to the plaintiffs as in the said second plea mentioned, or in respect of the causes of action thereby satisfied, but in respect of the residue of the said damage sustained by them by reason of the said alleged breach.

The plaintiffs also demurred to the second plea, the ground of demurrer stated in the margin being "that the judgment of the said High Court of Admiralty is no bar to this action, and that the said second plea does not show any satisfaction of the claim of the plaintiffs." Joinder.

Third plea,—that the causes of action in the declaration mentioned accrued after the passing of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and while the said act was in force and the provisions thereof in respect of the matters in this plea mentioned; that the defendants then were the owners of the said ship *Leo*, then being a sea-going ship, and that the causes of action in the declaration mentioned were in respect of loss or damage by reason of improper navigation of such sea-going ship caused to the said ship of the plaintiffs, and the cargo, tackle, apparel, and other furniture, goods, chattels, and effects on board the said last-mentioned ship; and that such loss or damage as aforesaid occurred without the actual fault or privity of the defendants or either of them; and that the value of the said ship and the freight due or to grow due in respect of such ship during the

voyage which at the time of the happening of the said loss or damage was in prosecution or contracted for, was a sum of money, to wit, the sum of 957*l.* 4*s.* 6*d.*, and the *defendants paid such last-men- [*103 tioned sum to the plaintiffs before suit.

The defendants also demurred to the second replication to the second plea, the ground of demurrer stated in the margin being, "that the judgment of the said Court of Admiralty is a bar to the whole action and to the matters mentioned at the end of the said replication." Joinder.

Archibald, for the plaintiffs.(a)—It appears from the record that the owner of the cargo alone intervened in the Admiralty Court: the owners of the ship did not appear: and this action is brought to recover the difference between the amount recovered in the suit in that court and the damage actually sustained by the plaintiffs in consequence of the defendants' negligence. The judgment in the suit in the Admiralty Court, which is a judgment in a proceeding in rem, affords no answer to the plaintiffs' claim. The plaintiffs are clearly entitled to recover to the extent of the value of the defendants' vessel immediately before the collision: *Brown v. Wilkinson*, 15 M. & W. 391. There are two cases in the Admiralty *Court where [*104 recourse was allowed against the ship, on the personal proceeding proving fruitless. In the case of *The Bengal*, W. H. Henderson, Swabey's Adm. R. 468, a personal action (by the master for wages) proving fruitless, he was allowed to proceed in rem against the ship. So, in *The John and Mary*, Swabey's Adm. R. 471, the plaintiff, having sued in a cause of collision at common law, and recovered a verdict, was held to be entitled, on the defendant proving insolvent, to sue the ship in the Court of Admiralty, even after the ship had been transferred to a third party.

Brett, Q. C., for the defendants.(b)—There were two courses open to the plaintiffs. They might have sued the owners in personam, in which case they would have recovered all the damages they had sustained from the collision; or, if they chose to proceed in rem, thereby obtaining the great advantage of seizing the ship and so insuring the damages to the extent at least of the value of the ship, they must be

(a) The points marked for argument on the part of the plaintiffs were as follows :—

"That the second plea is bad, and the second replication to it is good: That the proceedings in the Admiralty Court set forth in the second plea, being proceedings merely in rem, constitute no answer either in bar or estoppel of the present action, which is a proceeding in personam: That the second plea does not allege or show any satisfaction or merger of the claim of the plaintiffs: That it is admitted by the second plea, or appears by the second replication to it, that the plaintiffs have only received a partial satisfaction; and that the plaintiffs are entitled, after proceeding against the ship, to proceed against the defendants personally until the damages sustained have been completely satisfied."

(b) The points marked for argument on the part of the defendants were as follows :—

"1. That the second plea is good, and that the second replication to it is bad:

"2. That the proceedings in the Admiralty Court mentioned in the second plea constitute a full answer to the action, and show a bar or estoppel thereof; and that a personal action cannot be engrafted upon an action in rem:

"3. That the defendants, having elected to take their remedy by the proceedings in the Admiralty Court, are barred from proceeding in a second action, the parties and cause of action being the same:

"4. That the second plea shows a full satisfaction and merger of the plaintiffs' claim:

"5. That, even if it be admitted on the pleadings that the plaintiffs have received a partial satisfaction only, yet the proceedings, judgment, and decree in the Court of Admiralty are a bar to the whole action at law."

*105] content with *that: they take their chance whether or not the ship will produce enough to satisfy their entire damages: Coote's Admiralty Practice 7, 8. Such an action as this has never yet been maintained: it is not competent to a party to sue in personam after having elected to sue in rem. [WILLES, J., referred to the case of *The Bold Buccleugh*, Harmer, app., Bell, resp., 7 Moore's P. C. 267. There, a Scotch steamer ran down an English vessel in the Humber. An action was commenced in the Court of Admiralty in England by the owners of the English vessel against the owners of the steamer, and a warrant of arrest issued against the ship; but, before the ship could be arrested, she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owners of the steamer in the court of session in Scotland for the damage, and the steamer was arrested under process of that court, but subsequently released upon bail. Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the court of session were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that court for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the court of session. The owners of the steamer appeared under protest in the Admiralty Court, and pleaded, amongst other pleas, *lis alibi pendens*. It was held by the judicial committee of the Privy Council that the plea was bad, as the suit in Scotland was in the first instance in personam, the proceedings being commenced by process against the persons of the owners of the

*106] vessel (the defendants), *and the arrest of the steamer only collateral, to secure the debt, while the proceedings in the Admiralty Court in England were, in the first instance, in rem, against the vessel, and therefore, the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other.] In the case of *The Kalamazoo*, 15 Jurist 885, an American ship was arrested in a cause of collision promoted in the Admiralty Court by the owners of the ship and cargo damaged, and bailed for 3500*l.*, and the damage pronounced for, and referred to the registrar and merchants. It being subsequently ascertained that the damage to the cargo exceeded 4800*l.*, the owners arrested the ship in a fresh action for the difference. Dr. Lushington said: "I think, when a party has once proceeded before the court, and recovered judgment, he is barred from proceeding in a second action. But it is said that the party ought to receive the whole amount of the damage done, to the full extent of the value of the ship in fault. To this there are two answers. First, it was their own fault if they did not arrest her to the full value of the ship; and, secondly, there is no authority to show, that, having obtained bail for the ship, you can afterwards proceed against the owner to make up the amount of the loss. I cannot think that I can engraft a personal action upon an action in rem." There, the plaintiffs had elected their remedy, and they had obtained a decree for all the damages they claimed in the first action. [WILLES, J.—Dr. Lushington refused to engraft upon an action in rem a second action in rem.] In the case of *The Hope*, Hepburn, 1 W. Rob. 154, the value of the

vessel condemned being insufficient to answer the damage, the same learned judge held that it was not competent for the court to engraft upon the proceeding in rem a personal action against *the owner of the vessel to make good the excess of damage beyond the proceeds of the ship. "Looking," he says, "to the general principles upon which the proceedings in this court are conducted, it is, I apprehend, wholly incompetent for the court to engraft a personal action against the master as part-owner of this vessel upon the proceedings which have already taken place in this cause. It may be true, as stated, that the proceeds of the *Hope* will prove inadequate to answer the full amount of the damages which the owners of the *Nelson* have sustained. If so, it is undoubtedly a hardship upon these owners; but this circumstance will not entitle me to exercise a jurisdiction in their behalf, which, according to my own impression, I clearly do not possess. I am not aware of any case in which this court, in a proceeding of this kind, has ever engrafted upon it a further proceeding against the owners, upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of the damage pronounced for." [BYLES, J.—There is nothing there to show that the jurisdiction of this court is affected by the proceedings in the Admiralty Court.] Having obtained a decree of a court of competent and concurrent jurisdiction,—a court whose decrees and orders are to have the effect of judgments at common law: 24 Vict. c. 10, s. 15,—it is contrary to reason to hold that a party shall be entitled to proceed for the same cause of action in another court. The case of *The Volant*, Merchant, 1 W. Rob. 383, 1 Notes of Cases 503, is to the same effect as the case of *The Hope*, Hepburn. In the two cases in the Admiralty Court relied on by the other side, there had been no execution upon the judgment in the first proceeding. Whereas, this, it is submitted, is precisely the same as if, after judgment and execution in an action in one common-law court, a *second action were brought in another court in respect of the same cause. In *Perry v. Barker*, 8 Ves. 527, 13 Ves. 198, after foreclosure and sale of the mortgaged estate, the Court of Chancery granted an injunction to restrain the mortgagee from seeking to recover the difference at law. In the case of the *Fortitudo*, Henrickson, 2 Dods. Adm. R. 58, it was held that parties who have abandoned a former suit instituted by them to compel payment of certain alleged bottomry-bonds, will not be permitted, unless on strong grounds shown, to carry on proceedings a second time to enforce a demand founded on the very same bonds. By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 504, the owner's liability is in no case to exceed the value of the ship, where the event has happened without his actual fault or privity. That provision will be futile, if a proceeding of this sort be permitted.

Archibald, in reply, was stopped by the court.

WILLES, J.—I am of opinion,—and my Brother Williams, who was obliged to go to Chambers, desired me to say that he concurred with us,—that this plea cannot be sustained. The plea sets up the exception of *res judicata*, and therefore must show either an actual merger or that the same point has already been decided between the same parties. This, I apprehend, is clear from the authority of Comyns's Digest, *Action* (K. 1.), and the following divisions. But it is unneces-

sary to refer to the ancient authorities, further than to say that they are entirely consistent with the modern ones, as well as with the rule of the Civil law. Where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter *action. To constitute such former recovery a bar, *109] however, it must be shown that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered, in the former suit that which he seeks to recover in the second action. Every one is familiar with the case of a party who brought an action for the recovery of 1000*l.*, and for default of evidence recovered 5*l.* only, and then brought a second action to recover the balance; and the recovery in the former action was held to be a bar to the latter, on the ground that the plaintiff had had an opportunity of recovering in the first action the whole of his demand, and that, regard being had to the shortness of life, it was unreasonable to allow a defendant to be vexed a second time for the same cause.(a) But, in order that it may be a bar, the circumstances must be such that the plaintiff might have recovered in the former suit that which he seeks to recover in the second. The authorities in the Civil law upon this subject are collected by Vice-Chancellor Knight Bruce in a very remarkable judgment in a case of *Barrs v. Jackson*, 1 Y. & C. C. C. 588 et seq.(b) If that be the true principle, let us see what the former suit here was. Now, the former suit, as explained in the judgment of the Privy Council in the case of *The Bold Buccleugh*, 7 Moore's P. C. 267, was for the purpose of establishing a maritime lien of the plaintiff by reason of the misconduct of the owners of the vessel which had caused the damage, and a proceeding which had for its object the obtaining from the proceeds (or the bail) satisfaction for the injury inflicted. What is the object of the present action? It is to recover compensation from the defendants for the damages which the plaintiffs have *110] sustained by reason of the *injury done to their ship. It is obvious that these two are not identical, unless the proceeds of the sale of the defendants' vessel are equal to or exceed the amount of the damages sustained by the plaintiffs' vessel. This plea does not supply us with the means of ascertaining that fact: there is, therefore, an entire absence of the essential part of a plea of *res judicata*. It is a condition of such a plea that it should show that the first proceeding was one in which the plaintiff might have recovered that compensation which he seeks to recover in the second. We have been pressed by Mr. Brett to say that the former judgment must necessarily be taken to have been for the whole of the damages which the plaintiffs have sustained. That, however, would I think be putting a novel and inconsistent construction upon the judgment of the Admiralty Court. It comes to this. Here is a lien which it requires the intervention of the court to make available, by decreeing a sale. If a person having an ordinary lien upon a chattel, with a power of sale, whether by agreement, or by act of parliament, were to sell it for a sum which satisfied only one-half of the debt, would he be prevented from suing in a court of law for the recovery of the other half? Clearly no.

(a) See *Barber v. Lamb*, 8 C. B. N. S. 95 (E. C. L. R. vol. 28).

(b) And see *Barrs v. Jackson*, 1 Phillips 562.

Then, why should the plaintiffs be precluded here? Several cases have been referred to, where judges of great eminence and experience have refused to allow a proceeding in personam against the owner in the Admiralty Court to be engrafted upon a proceeding in rem, saying that it was contrary to the practice of that court.^(a) It may very well be, looking to the *reluctance expressed by Sir William Scott, [*111 in the case of the *Fortitudo*, 2 Dods. Adm. R. 58, to permit a second proceeding to enforce payment of bottomry-bonds, after the abandonment of a former suit instituted for the same purpose, that there is something in the constitution and practice of the Admiralty Court which militates against a proceeding like this. But there is certainly no such reluctance in the common-law courts. Further, there is the authority of Dr. Lushington in the case of *The Hope*, Hepburn, 1 W. Rob. Adm. Cas. 154, that it is not competent for the court to engraft upon a proceeding in rem a personal action against the master (also a part-owner), to make good the excess of damage beyond the proceeds of the ship. The learned judge there expressly based his judgment upon the general principles upon which the proceedings in the Admiralty Court are conducted. But, in the case of *The John and Mary*, Swabey's Adm. Rep. 471, the plaintiff, having sued in a cause of collision at common law, and recovered a verdict, was allowed, insolvency intervening, to assert his lien in the Admiralty Court upon the ship, even after she had been transferred to a third party. It would seem to be a very extraordinary and somewhat inconsistent thing, if the proceeding in personam should be held no bar to a subsequent proceeding in rem, and yet the proceeding in rem should be held a bar to a subsequent proceeding in a common-law court to recover what the plaintiff had failed to recover in the former suit. I must confess I see no reason why the plaintiffs should *not be al- [*112 lowed to recover the balance of the damage they have sustained by a proceeding in this court. Mr. Brett did not very much rely on the Merchant Shipping Act. No doubt he will have the full benefit of its provisions on a future occasion.

BYLES, J.—I am of the same opinion. This is like the case of a man who, having a debt secured by a pledge or mortgage, necessarily resorts to legal proceedings to make the pledge available. Having done so, and thus realized only a portion of his debt, I see no reason why he should not have recourse to a common-law court for the recovery of the residue. The right to proceed in the Admiralty Court in rem, after the personal remedy has proved abortive, has been twice recognised in Swabey's Admiralty Reports,—once in the case of the master's wages (*The Bengal*, p. 468), and again in the case of a collision (*The John and Mary*, p. 471). The only difficulty here is, that the damages may exceed the value of the ship. The defendants, however, could not plead to damages: they could only rely upon the

(a) "The warrant of arrest," says Sir William Scott in that case, "is confined to the ship; it goes no further. It appears to me, therefore, that no personal liability beyond that value could be engrafted upon such a mode of proceeding; and for this obvious reason, that, if I were to engraft such personal responsibility upon the owner, the original process would not justify such proceeding. Not only the original process, but the appearance given by the individual himself, would not justify it, because he has appeared only to protect his interest in the ship, both by the form of the warrant and the form of his appearance."

decree in the former suit as a bar. I think it is no good plea in bar.

And, for the reasons already given, Judgment for the plaintiffs.

That the partial recovery of a debt obtained by a resort to a pledge, does not preclude the creditor from suing for the residue of his claim, which was the point determined in the principal case, is also involved in the decision of *Ayers v. Watson*, where the right to resort to additional security for the debt was not only conceded as a remedy independent of the controversy, but was assumed as the ground upon which an admission made during the trial that the creditor had additional security, was held not to be an estoppel. The undercurrent of the argument in favour of an estoppel, was that as the creditor might avail himself of the security, it should go in reduction of the amount to be recovered, and would thus constitute a partial defence. But the court refused to entertain the proposition that the security ought, before it was collected, to be treated as a fund which should contribute to the liquidation of the debt; and unless they maintained that notion, the existence of the security did not become material, and the admission, in consequence, being irrelevant, could under no circumstances operate as an estoppel. The case was this: A. secured a debt by mortgaging a ship to B., who took possession; C. obtained judgment against A. and levied on the ship; B. replevied, and C. defending in sheriff's name, called A., who testified that he had also given B. a ground-rent mortgage as additional security for the debt. A. was held not estopped by this admission in a suit on the ground-rent mortgage from denying that the mortgage was a security for the debt: 25 Leg. Int. (Supreme Court of Pa. 1863) 316.

It is mentioned incidentally in the decision that the defendant Watson had included in the sum recovered by him in the New York replevin suit, the \$2800 secured by the ground-rent mortgage as a part of the debt covered by the mortgage on the ship. Since this remark was made, however, the New York Court of Appeals has reversed the judgment by the Supreme Court, on the ground that the judge's charge was inconsistent with the evidence; which consisted of the testimony of Maximilian Goepp, Esq., who declared the mortgage invalid by the law of Pennsylvania. The judge ignored this testimony, and charged the jury that the mortgage was under the circumstances valid by the law of Pennsylvania. The Court of Appeals evidently concurred in the accuracy of the judge's statement of the law of Pennsylvania, but pronounced it unwarranted by the evidence: *Watson v. Campbell*, New York Daily Transcript, Jan. 15, 1869. It has, from the earliest times, been recognised in Pennsylvania as one of the exceptions to the rule which requires an immediate change of possession that the mortgage of a ship at sea is valid, provided the mortgagee takes possession as soon after her arrival as he conveniently can: *Morgan's Ex'rs v. Bidle*, 1 Yeates (1791) 3.

Goodrich v. The City, was the converse of the principal case. The plaintiff there sought first to recover at common law in the state courts for the loss of his vessel, and subsequently he endeavoured to recover for the same loss in admiralty, but was precluded by the judgment against him in the state court: 5 Wall. (1866) 566.

*CLAUDE BOUILLON et C^{ie} v. LUPTON. June 22. [*113

Three steamers, the Bourdon, the Papin No. 1, and the Papin No. 6, which were intended for the navigation of the Danube, were insured "at and from Lyons to Galatz," with leave to call at all ports and places in the Mediterranean for all or any purpose, beginning the adventure at Lyons, &c., with a declaration that "it should be lawful for the said ships to proceed and sail to and touch and stay at any ports or places whatsoever, and with leave to tow and be towed, without being deemed any deviation," &c.,—warranted to sail on or before the 15th of August, 1861.

The Papin No. 6 left Lyons on the 24th of July, and arrived at Marseilles on the 30th. The Bourdon and Papin No. 1 left Lyons on the 2d of August, and arrived at Marseilles, the former on the 7th, the latter on the 8th. All three vessels were in a fit and proper state for the voyage down the Rhone to Marseilles, but, from the nature of the navigation, they could not, on leaving Lyons, be in a state of readiness,—as to masts and sails, chains and anchors, sea crew, &c.,—for the sea portion of the voyage to Galatz.

They all left Marseilles properly manned and equipped for the residue of the voyage on the 23d of August,—the intermediate time having been consumed in the sea-equipment, and in procuring the surveys and permit to depart required by the French law, which could only be obtained at Marseilles. This delay the jury found not to have been unreasonable:—

Held, that both the implied warranty of sea-worthiness, and the express warranty to sail on or before the 15th of August, were complied with.

As to the Papin No. 6, which arrived at Marseilles on the 30th of July, it appeared that she might have been got ready for sea several days earlier than she was, but that the captain deemed it prudent to detain her at Marseilles in order that all three vessels might depart in company. The jury having found that this was a reasonable cause of delay as to that vessel,—the court refused to disturb their verdict.

THIS was an action brought by the plaintiffs, a company duly constituted and established in Paris as a société en commandite according to the laws of France, and known as the Franco-Serve Company, upon three policies of insurance.

The first count of the declaration stated, that, by a policy of insurance, bearing date the 6th of September, 1861, the plaintiffs, by Messrs. Morice & Dixey as their agents, caused themselves to be insured, lost or not lost, *at and from Lyons to Galatz*, and while there for ten days, with leave to call at all ports and places in the Mediterranean for all or any purpose, upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship or steamer Bourdon, beginning the adventure at Lyons as above, and continuing the same during the said voyage and until the said ship and premises should be arrived at Galatz, and while there for ten days, against perils of the seas and certain other perils and adventures as therein mentioned: and it was thereby *declared that it should be lawful for the said ship and premises in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, and *with leave to tow and be towed*, without being deemed any deviation, and without prejudice to that insurance; and that the said ship and premises were and should be valued at "On hull, &c., valued 3000*l.*; on machinery, valued 3000*l.*,—6000*l.*," to pay average on each as if severally insured, and general average as per foreign statement, if so made up: And by the said policy the said ship and premises were warranted free from capture and seizure and the consequences of any attempt thereat: And the said ship was warranted to sail on or before the 15th day of August, 1861: And by a memorandum there under written the said ship and premises were warranted free from average under 3 per cent. unless general or the ship be stranded: Averment, that the defendant had notice of all the premises, and thereupon,

in consideration of a certain premium paid to him by the plaintiffs for the insurance of 100*l.* upon the said ship and premises in the said policy mentioned, the defendant subscribed the said policy for the said sum of 100*l.*, and became an insurer to the plaintiffs of and upon the said ship and premises to that amount, and upon the terms and conditions of the said policy; that the plaintiffs were then and from that time until and at the time of the loss thereafter mentioned interested in the said ship and premises to the amount of all the moneys by them insured thereon; that the said Morice & Dixey effected the said policy as their agents and on their behalf; and that the plaintiffs performed and complied with all warranties in the said policy contained; that the said ship with the premises on board thereof departed on her said voyage, and while she was proceeding on the said voyage, and *115] premises were, by perils insured against, wholly lost; and that the plaintiffs did all things on their part to be done, and all things happened, and all times elapsed, to entitle the plaintiffs to be paid by the defendant the said sum of 100*l.* so insured by him as aforesaid; but that the defendant had not paid the same.

The second count was upon a policy in the like terms and for the same amount on the ship or steamer "Papin No. 1:" and the third count was upon a policy in the like terms and for the same amount on the ship or steamer "Papin No. 6." There was also a count for money received by the defendant for the use of the plaintiffs, and for money found due on accounts stated.

The defendant pleaded, as to the first, second, and third counts,—first, that the plaintiffs did not cause themselves to be insured as in those counts respectively mentioned, nor did the defendant become an insurer to the plaintiffs as in those counts respectively mentioned, as therein respectively alleged,—secondly, that the plaintiffs were not interested in the respective subject-matters of insurance in those counts mentioned, as therein respectively alleged,—thirdly, that the said ships and premises respectively did not depart on the voyages insured, as in those counts respectively alleged,—fourthly, that the said ships and premises respectively were not, nor was any part of the same respectively, lost by the perils insured against, as in those counts respectively alleged,—fifthly, that the said ships and premises respectively did not sail on or before the 15th day of August, 1861, within the true intent and meaning of the warranties contained in the said policies respectively,—sixthly, that, at the time when the said ships *116] and premises respectively departed and set sail on the voyages respectively insured by the said policies respectively, they were respectively not seaworthy for the respective voyages,—seventhly, that, before the respective losses in those counts mentioned, the said ships and premises respectively wrongfully and improperly delayed proceeding upon and deviated from the voyages respectively insured,—and, to the money counts, eighthly, never indebted. Issue thereon.

The cause was tried before Cockburn, C. J., and a special jury, at the last Spring Assizes at Kingston, when the following facts were proved and admitted:—The plaintiffs are a French société en commandite, whose object, amongst other things, was, to run steamers on the river Danube. For this purpose they purchased the steamers in

question, the Bourdon, the Papin No. 1, and the Papin No. 6, which were or had been river steamers built for and employed in the navigation of the Rhone, and were then at Lyons: and, in order to strengthen them and put them into condition for performing the sea-voyage to the Danube, they had them (and a fourth vessel called the *Creuzot*) repaired under an agreement whereby the three first-named vessels were to be completed and ready to depart by the 15th of July, 1861.

In the month of July, 1861, the plaintiffs, through their agents, effected the three policies of insurance in question on the hull and machinery of the three steamers Papin No. 1, Papin No. 6, and Bourdon, then at Lyons. The policies were subscribed in the usual manner by the defendant, an underwriter at Lloyd's.

The steamer Papin No. 6 left Lyons on the 24th of July, and the Papin No. 1 and the Bourdon on the 2d of August, 1861.

The first part of the voyage from Lyons to Galatz consists of a river voyage down the Rhone for a *distance of about three hundred miles, viz. from Lyons to Arles, at or near the mouth of [*117 the Rhone. This navigation can be performed only by vessels of light draught and without masts or standing rigging, in consequence of the shallowness of the water and of there being several bridges across the Rhone; and, according to the French law, it is necessary that there should be a special permit for this river voyage, and that the vessel should be manned by a competent river crew.

It was admitted, on behalf of the defendant, that the vessels were when they left Lyons, and continued to be throughout the river navigation, in a fit, proper, and sea-worthy state and condition for the navigation of the river.

The vessels, on leaving Lyons, had their masts on board, but none of the said masts up; it being, as before mentioned, impossible to descend the Rhone with the masts up, on account of the bridges over the river. The steamers, at the time they left Lyons, were not furnished with rigging, sails of any kind, compasses, chains, or sea-anchors,—all of which were indispensable for the voyage to Galatz; and they were manned with river crews, and not with sea crews. The rigging, sails, compasses, chains, and sea anchors for such voyage could not be purchased at Lyons, but might, if necessary, have been purchased at Marseilles or some other seaport, and sent up to Lyons. A crew for a sea voyage could not be procured at Lyons. Chains and sea-anchors could not have been carried on board the said steamers during the river navigation, on account of the draught of water.

The steamer Papin No. 6 reached Arles on the 28th of July, left it on the 29th, and reached Marseilles on the same night, and was notified on the following day. The Bourdon reached Arles on the 6th of August, left Arles on the same day, arrived at Marseilles on the 7th, and *was notified on the following day. The Papin No. 1 [*118 reached Arles on the 8th of August, left Arles on the same day, and arrived at Marseilles and was duly notified on the 9th.

It was necessary, for the reasons and purposes hereinafter mentioned, that all the three steamers should proceed to and stay at Marseilles.

Arles is a port on the Rhone a little above the mouth of the river,

and Marseilles is distant about thirty miles from the mouth of the Rhone. According to the French law, the river navigation stops at Arles; from Arles to Marseilles is considered a sea voyage. The voyage between these two places is a coasting voyage of about thirty-two English miles.

The three steamers left Arles in the same condition (except as to the crews) in which they left Lyons. They were not, nor was either of them, manned with complete sea crews; but some additional sailors were taken on board each of them at Arles, to assist the several river crews in bringing the steamers round from Arles to Marseilles; and each vessel was under the charge of a skilled and competent sea captain.

Masts, ropes, chains, and sea-anchors could have been obtained at Arles, but not so conveniently or expeditiously as at Marseilles. A sea crew might be obtained at Arles. Compasses and sails could only be obtained at Arles by ordering them from Marseilles. There are no persons at Arles competent to adjust the compasses, which was necessary in the case of each of the three steamers.

When the steamers left Arles, and throughout the voyage to Marseilles, they were in fit and sufficient state and condition to perform that portion of the voyage; but they were not sea-worthy for the voyage to Galatz: and some alteration in their rudders was necessary.

*[119] The French law requires that every vessel, before putting to sea, should undergo two inspections by a commission of "capitaines visiteurs;" that she should receive on the first occasion a certificate of survey enumerating what (if any) repairs, alterations, or additions are necessary to render her fit to put to sea; and that, on the second inspection, she should receive a certificate of fitness for sea, reciting the requisitions made in the first, and specifying that they had severally been complied with. In all cases the two inspections are indispensable, even though upon the first inspection no repairs, alterations, or additions may have been ordered. The French law, in the case of a steamer, further requires that there should be another inspection by other officers, to test her fitness for sea in respect to her machinery, and to certify thereto. When these and other provisions of the law have been complied with, the vessel, unless she is navigating backwards and forwards between fixed ports under a regular license, must obtain a "permit de partir" before she will be allowed to leave port.

The commission of inspection for all ships and steamers to sail from the Mediterranean coast of France, sits at Marseilles, where the commissioners reside.

In the case of the three steamers in question, the several inspections and certificates above enumerated were necessary; and the same could not have been had at any other place than Marseilles.

Upon the arrival of the vessels respectively at Marseilles, the furnishing them and fitting them out with what was required for the voyage to Galatz was commenced and proceeded with. The masts and rigging were set up; and the sails were put on board and fixed. The measurements for these sails had been taken at Lyons by a ship-

broker of Marseilles in the early part of *July; and the sails were ordered to be and were ready at Marseilles for the several vessels at the times of their respective arrivals at that port. Chains and sea-anchors were also put on board the several steamers, and their compasses were adjusted. [*120]

The crew of the Papin No. 6 were hired and went on board her at Marseilles on the 30th of July; that of the Bourdon were hired and went on board her at Marseilles on the 7th of August; and that of the Papin No. 1 were hired and went on board her about the 16th or 17th of August.

Application was made on the 13th of August to the "capitaines visiteurs" to inspect all the three vessels. The first survey of those officers took place on the 16th of August. The certificates of such surveys were signed on that day, and registered in the registry office of the Tribunal de Commerce at Marseilles on the 20th. The second survey of the "capitaines visiteurs" on each of the three vessels took place on the 19th of August; and the certificates of such last-mentioned surveys were registered as required by the French law on the 20th.

The "rôle d'équipage," or muster-roll, was presented for signature and duly signed on the 19th of August. The French law requires that the said rôle d'équipage should be signed before the sailing license is granted. The sailing license or permit de partir was applied for on the 19th of August; and a provisional permit, which was sufficient to authorize the vessels' sailing on the voyage, was granted on the 20th.

The three vessels were ready to sail for Galatz on the morning of the 20th of August, and not before.

The Papin No. 6 might have been properly equipped, certified, and ready to sail from Marseilles some days before the 20th of August: but her equipment was not hastened as much as it might have been, because *it was deemed prudent and reasonable, for the common interests of the underwriters and the assured, that she should be [*121] delayed for the purpose of sailing in company with the other two vessels. A captain in the French navy gave evidence to this effect.

The three vessels were detained by stress of weather at Marseilles from the 20th of August until the 23d, on which day they set sail in company.

It was admitted on behalf of the defendant, that, at the time the three vessels so left Marseilles, they were in all respects sea-worthy for the voyage to Galatz. No delay or deviation took place from the time of the vessels' leaving Marseilles.

The three steamers all went down together in the Black Sea on the 14th of October, 1861, the first day they got into the Black Sea, and within a day's sail of their destination, and were totally lost.

The Lord Chief Justice left it to the jury to say whether there was an unreasonable delay in the fitting out of all or any of the said three steamers at Marseilles, and requested the jury, in the event of their thinking, that, in the case of the Papin No. 6, there had been unreasonable delay, to find specially whether it was prudent and reasonable, for the common interest of the underwriters and the assured, that the

Papin No. 6 should be delayed for the company of the other two vessels.

The jury found that there was no unreasonable delay as regarded the Papin No. 1 and the Bourdon; and, as regarded the Papin No. 6, that the delay was justified by the fact of her waiting for the other vessels.

Upon these findings, his Lordship directed the verdict to be entered for the plaintiffs; reserving leave for the defendant to move to enter the verdict for him as to all or any of the vessels, upon the grounds,—
 *122] first, that the warranties as to the sailing on or before *the 15th of August, 1861, were not complied with,—secondly, that the vessels were bound to sail on or before that day, properly equipped for the voyage, without being afterwards delayed for the purpose of preparations and being made ready for the voyage,—thirdly, that the vessels were not sea-worthy at Lyons, nor at the time of their commencing their voyage upon the open sea: and, as to the vessel Papin No. 6, on the further ground that the delay at Marseilles in waiting for the other vessels was not justifiable.

Bovill, Q. C., in Easter Term last, obtained a rule nisi accordingly, or for a new trial, on the ground that the verdict was against the evidence on the last point, viz. as to the Papin No. 6. He cited *Ridsdale v. Newnham*, 4 Campb. 111, 3 M. & Selw. 456, *Pettigrew v. Pringle*, 3 B. & Ad. 514 (E. C. L. R. vol. 23), and 1 Arnould on Insurance, 2d edit. 643. [WILLES, J., referred to *Biccard v. Shepherd*, 14 Moore's P. C. 471.]

Horace Lloyd and Watkin Williams showed cause.—Two questions are presented for consideration in this case,—first, whether there has been a compliance with the warranty "to sail on or before the 15th of August,"—secondly, whether there was a deviation, more especially on the part of one of the vessels, the Papin No. 6, by an unreasonable delay at Marseilles after the commencement of the voyage. The whole law upon the subject of the warranty to sail on or before a given day will be found in the cases of *Ridsdale v. Newnham*, 4 Campb. 111, 3 M. & Selw. 456, *Pettigrew v. Pringle*, 3 B. & Ad. 514 (E. C. L. R. vol. 23), *Cochrane v. Fisher*, 2 C. & M. 581, 4 Tyrwh. 424 (in error, 1 C. M. & R. 809, 5 Tyrwh. 496), and *Lang v. Anderdon*, 3 B. & C. 495 (E. C. L. R. vol. 10), 5 D. & R. 393. The result seems to be, that, in order to comply with a warranty to sail, the ship must not only have broken ground on or before the day, but she must have done
 *123] *so with an intention of at once proceeding on her sea voyage, being then in a state of perfect readiness for it. Sea-worthiness is a relative term, having reference to the particular perils the ship may be expected to encounter: *Gibson v. Small*, 4 House of Lords Cases 353. Here, the insurance is for a voyage from Lyons to Galatz,—Lyons being about three hundred miles up the Rhone, and Galatz about ninety-five miles from the mouth of the Danube (see *Schilizzi v. Derry*, 4 Ellis & B. 882),—with leave to call at all ports and places in the Mediterranean for all or any purpose; and it was declared "that it should be lawful for the vessels to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, and with leave to tow and be towed, without being deemed any deviation, and without prejudice to the insurance." The Rhone, as is

well known, and as the underwriters must be assumed to have known, is a narrow and swift river, spanned by several bridges, and having its course obstructed by shoals and mud-banks which make its navigation exceedingly difficult, and only to be performed by a vessel without masts and having on board a river crew. The facts show that the vessels, which all left Lyons before the 15th of August, 1861, started with everything on board and in all respects completely fit for the voyage down to Arles. It appears also that it was convenient in the highest degree for the vessels to go to Marseilles for some of the equipment necessary for the sea portion of their voyage, and absolutely essential that they should go there for some of them, and especially for the surveys required by the French law and for the permit de partir, without which they could not have proceeded to sea. That the vessels left Lyons in a fit state for the prosecution of the voyage down the river, is conceded; and it was proved that what was done at Marseilles *was proper and necessary to be done there; and the [*124 jury have found that there was no unreasonable delay. In *Dixon v. Sadler*, 5 M. & W. 405, 414, Parke, B., thus lays down the law as to the implied warranty of sea-worthiness,—“In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be sea-worthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the insurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk;(a) and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were at the commencement of each stage of the navigation properly manned and equipped for it.” Several cases are referred to as establishing that principle: and it received the confirmation of the judicial committee of the Privy Council in the recent case of *Biccard v. Shepherd*, 14 Moore’s P. C. 471. In the case of an insurance of a vessel on a voyage to the Greenland fishery, it is well known that part of the necessary equipment, as well as the crew, are taken on board when the vessel arrives at the Orkney Islands. There, the warranty to sail on or before a given day would be complied with by a departure in a state of fitness for that portion of the voyage. This voyage clearly is one which is divisible into distinct parts or stages, according to the rule laid down by Lord Wensleydale; and it is enough if the vessels, at the time of their departure from Lyons, were, as the jury have *found, and as indeed the defendant admitted, in a fit state to [*125 undertake the voyage to Arles, and fit on leaving Arles for the voyage to Marseilles. The rule laid down in *Arnould on Insurance*, § 228, upon the authority of *Lang v. Anderdon*, 3 B. & C. 495 (E. C. L. R. vol. 10), 5 D. & R. 393, *Ridsdale v. Newnham*, 4 Campb. 111, 3 M. & Selw. 456, and *Pettigrew v. Pringle*, 3 B. & Ad. 514 (E. C. L. R. vol. 23), applies only to a voyage from port to port. In the last-mentioned case the vessel put into another port, and made that for all essential purposes the port of departure. This is well illustrated by the case

(a) *Annen v. Woodman*, 3 Taunt. 30; *Hibbert v. Martin*, Park Ins. 6 edit. Vol. 1, p. 299, n.

*129] that she had not her full quantity of ballast (only fifteen tons instead of fifty), there being a bar at the mouth of the river which the ship could not have crossed with that quantity on board. Boats were in waiting outside, on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, which was not done till the 4th, and the vessel proceeded upon her voyage on the 8th. It was held that the ship's dropping down the river and crossing the bar without her full ballast, was not a *sailing*; and that, until the ballast was completed, she was not *ready for sea* within the rule referred to by the policy. "The general principle of the decisions," said Lord Tenterden, "is this, that if a ship quits her moorings and removes, though only to a short distance, *being perfectly ready to proceed upon her voyage*, and is by some subsequent occurrence detained, that is nevertheless a *sailing*: but it is otherwise, if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage." And Littledale, J., said: "to entitle the plaintiff to recover, it should have appeared that the ship broke ground on the 1st of September, ready to go to sea. She required fifty tons of ballast to cross the Atlantic, and she had not that quantity on board till the 4th of September. It is said that when she broke ground she had as much ballast as she could take within the bar; but that is no excuse; it was the plaintiff's business to put himself in such a situation as to be sure of completing his ballast in the proper time. Having left it to the last moment, he must be liable for the consequence." So here, the plaintiffs should have taken care that the vessels should be *ready for sea* by the day named in the warranty. In *Graham v. Barras*, 5 B. & Ad. 1011 (E. C. L. R. vol. 28),

*130] a ship was insured from April 1st, 1831, to January 1st, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world, and by a distinct warranty it was declared that the time of clearing at the Custom House should be deemed the time of sailing, *provided the ship was then ready for sea*. The vessel insured was bound for the Bay of Fundy from Dublin, and the last day for sailing, by the rules, was, the 1st of September. She cleared out on the 31st of August, and dropped down the Liffey on the 1st of September, with an incomplete crew (though a full complement was engaged before the ship cleared out), to a place within the port of Dublin, where she lay at anchor the rest of the day. During that day, the whole crew came on board, and on the 2d she proceeded on her voyage, having been prevented from doing so on the 1st by an unfavourable wind. She was afterwards lost: and in an action upon the policy, it was held that the plaintiff was not entitled to recover, for that the ship did not *actually* sail till after the 1st of September, and that she was not ready for sea at the time of clearing out, the whole crew not being then on board. These cases, it is submitted, clearly show that these vessels were bound to be in a condition on the 15th of August to begin the voyage,—the entire voyage,—to Galatz; and the delay at Marseilles for the purpose of putting them in that condition was wholly unjustifiable. *Dixon v. Sadler*, 5 M. &

W. 414, is no authority for saying that a voyage may be split up into distinct portions quoad the warranty to sail on or before a given day and all that is laid down in the judgment of Lord Wensleydale in *Biccard v. Shepherd*, 14 Moore's P. C. 471, is, that there may be one degree of sea-worthiness for a voyage down a canal or river, and another *and different one for a voyage to be performed upon [*131 the open sea. [WILLES, J.—I do not see how you give any application to the language of Lord Wensleydale in that case. Your argument seems to be, that, although it is conceded that a different state of fitness or worthiness is required for the river navigation from that which is required for the sea, no time is to be allowed for the necessary change in the condition of the vessels.] The plaintiffs were bound to have the vessels in a fit state and ready to proceed to sea by the day named in the warranty. It is not pretended that this might not have been done at Arles.

As to the vessel *Papin* No. 6, although she arrived at Marseilles on the 29th of July, no attempt was made to get her ready for sea before the 7th or 8th of August. The reason assigned for this, was, that it was considered advisable, having regard to the safety of the captains and crews, that the three vessels should sail in company. That, however, was a delay for the purpose of avoiding a peril not insured against: and there was no evidence to show, that, in case of danger arising in the course of their passage from Marseilles to Galatz, these vessels could have assisted each other. The case, as regards this point, is precisely within the principle of *O'Reilly v. The Royal Exchange Assurance*, 4 Campb. 246, and *O'Reilly v. Gonne*, 4 Campb. 249. In the former it was held, that, where a policy of insurance contains a warranty against seizure in port, if the ship, to avoid such seizure, runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the course of the voyage insured, the underwriters are not liable for a subsequent loss; and in the latter, where the policy contained no warranty against seizure, the underwriters were held liable. At all events, therefore, there must be a verdict for the defendant, or a new trial, as to the *Papin* No. 6.

*WILLES, J.(a)—This case presents some features of novelty: [*132 and, if the court were of opinion that the novelty was in the principle of law which it is necessary to affirm for the purpose of disposing of the rule, we should certainly have taken time to consider our judgment. But, as it appears to us,—upon full consideration, and after having had the advantage of a most able and elaborate argument on both sides,—that the principle which must determine the case is one which is clear as well as familiar, we have come to the conclusion that it will be better to dispose of it at once,—though, seeing the large amount involved, it would have been more satisfactory to our minds if the argument had taken place before a full court. The parties, however, were anxious that the case should be heard at these sittings: and, if either of them be dissatisfied with our decision, they will not be without remedy.

The novelty and peculiarity of the case, so far as the decisions are

(a) Williams, J., had left the court for the purpose of proceeding to Chambers before the close of the argument.

concerned, consists in this, that, instead of the voyage insured being from a port to another port across the ocean, it commences by a distinct navigation of some hundred miles down an inland river, where the conditions and the system of navigation are wholly and entirely distinct from those which apply to the rest of the voyage of the vessels to their port of destination. The facts proved at the trial show that it was a necessity, regard being had to the course of business pursued by persons using the navigation in question, and to that which must be regarded in all mercantile transactions, viz. the cost of conveyance and labour, and the like, that the vessels should upon starting from Lyons be in a state of preparation for the voyage down the river to *133] Marseilles only, but not *in a state of preparation fit for the voyage from Marseilles to Galatz. It would be useless to go through all the evidence upon this point: it is enough to select one striking fact which warrants that conclusion, viz. that the vessels, because of bridges, could not go down the river with their masts stepped; their sails would be unavailing; and they could only use steam-power: and, further, they would require an amount and a class of pilotage which would become unnecessary and useless when they reached the sea. Therefore, I repeat, the vessels must necessarily leave the place where their river navigation commenced, and must complete that river navigation in a state in which they would be wholly unsafe and unfit for the sea voyage. The river navigation was an entirely distinct portion of the voyage from Lyons to Galatz. Starting from Lyons, the vessels were not bound to be, and could not be, sea-worthy for more than the river navigation. It appears to me that no further statement of the facts is necessary for the purpose of dis severing the portion of the voyage between Lyons and Marseilles from that from Marseilles to Galatz, than the statement which I have already made.

What, then, is the conclusion to be drawn, with reference, first, to the warranty of sea-worthiness, and, secondly, to the warranty contained in this policy, to sail on or before the 15th of August? It appears to me to be impossible to read these warranties in the sense of saying that the vessels were to depart from Lyons in a complete state, fit to proceed upon their voyage to Galatz. The facts,—which must have been as well known to the insurers as to the assured,—show that that construction would make the warranty defeat the policy altogether. The vessels could not be sent from Lyons in a complete state of sea-worthiness for the voyage from that place to *134] Galatz. As, therefore, *the necessity of the case compels us to reject that construction, it appears to me that we must take each of these warranties separately, and see how far each of them has been complied with. And first I will take the warranty of sea-worthiness. For the reasons which I have already given, the warranty of sea-worthiness must have a different meaning as applied to the two different portions of the voyage. Whilst descending the Rhone, the vessels must be "sea-worthy,"—that is to say, in a state of fitness,—for the river navigation; and, whilst on their voyage from Marseilles to Galatz, they must be fit for the sea portion of the voyage. But then another difficulty is suggested, viz. that there was an intermediate voyage from Arles to Marseilles. With respect to the voyage

from the mouth of the Rhone to Marseilles, that appears to me to rest simply on geography. In one sense, no doubt, the vessels would get into the Mediterranean as soon as they left the mouth of the Rhone: but they did not then commence their sea navigation in the sense of a navigation for which a different preparation and a different sort of sea-worthiness was required: and it is with that we are now concerned. Then, can any distinction be drawn with respect to the voyage from Arles to Marseilles? Clearly not, unless Arles was the proper place,—assuming that there was any allowable place,—for the vessels to delay in order to change their state of preparation from a state proper for river navigation to a state proper for sea navigation. Now, for this we must resort to the evidence. It certainly was possible to procure at Arles the spars, sails, anchors, cables, and other appliances which were necessary to put the vessels in a fit state of preparation for the sea portion of the voyage. But, was it necessary or reasonable that the assured should incur the expense of having these things brought to Arles, when the vessels *could in their then [*135 state of preparation safely proceed to Marseilles and have them more conveniently and at less expense supplied there? and was there any delay which could prejudice the insurers? On the contrary, the delay which would have been caused by bringing to Arles the things necessary for a sea equipment would have extended to months; whereas, the whole was completed at Marseilles in a few days. But, further, supposing the vessels could have been and had been completely equipped for the sea voyage at Arles, it was still necessary that they should proceed to Marseilles for the purpose of obtaining the surveys and certificates which are essential to a due compliance with the laws of 1791 and 1807. The vessels had a right under the policy to touch and stay for all lawful purposes at any port or place on their way; and unquestionably Marseilles was a lawful port to stay at for that necessary purpose, regard being had to the nature of the voyage and the country to which the vessels belonged. It appears to me, therefore, that, as the vessels were sea-worthy from Arles to Marseilles, the objection that they were not completely fitted at Arles is one which resolves itself into a mere question of delay; and the evidence plainly shows that the assured would have been guilty of culpable delay if they had detained the vessels at Arles instead of at once proceeding to Marseilles.

The warranty of sea-worthiness, then, so far as regards the voyage from Lyons to Marseilles, having been complied with, has it been complied with as regards the remaining portion of the voyage, viz. from Marseilles to Galatz? As to the delay at Marseilles, it appears to me, that, if the underwriter could have shown that there was any residuum of repair completed at Marseilles which might have been completed at Lyons, and which caused any delay at Marseilles, he would have succeeded on the second *point. If it could have [*136 been shown that the repair to the rudder, for instance, was one which might have been completed at Lyons, and that the doing it at Marseilles caused a greater delay there than would have been occasioned by doing those repairs only which it was necessary should be done at Marseilles, I should have said that the delay defeated the policies. But it appears to me that the assurer has failed upon the

second proposition, even although he might have been successful on the first. With regard to the first, it is necessary to consider whether the repairs which were done to the rudder were repairs incidental to changing it from that description of rudder which is used for the river navigation to that which is adapted for a sea voyage, or whether they were such as were rendered necessary by some injury sustained in the course of the passage down the river, and which would fall within the ordinary class of "average." Now, there is no evidence that the rudder sustained any damage in coming down the river, or that the repair or alteration of the rudder caused any delay. Whilst the masts were being placed, by whatever number of men or mechanical appliances, it may well be that the rudder was at the same time undergoing the requisite alteration or repair by some trifling application of labour. If it can be supposed that every portion of repair which is done to a vessel must necessarily be done in some other portion of time consecutively from every other repair, and that the whole cannot proceed simultaneously, the argument will advance some way. But, even if that could be established, I should have thought that in the form in which this matter is presented to the court it was not competent to the defendants to raise such a question. I should have thought, that, if that was intended to be relied on by the defendant, it ought *137] to have been distinctly pointed out at the trial, and the opinion of the jury taken upon it. For the reasons which I have given, although proper to be mentioned to the court, it is, I think, a point which, when properly sifted, does not bear the importance which, under the influence of Sir George Honyman's argument, it at one time assumed.

Having, as I conceive, disposed of the warranty of sea-worthiness, assuming that there may be a case in insurance law in which the sea-worthiness need not exist with reference to the entire voyage at the time the vessel weighs anchor and breaks ground,—the next question is, whether there is in our law of insurance such a case as that of a warranty of sea-worthiness applicable in different degrees to two several parts of the voyage insured, arising either from the necessity of the case or from the usage of navigation; because it appears to me that either would warrant the assured in their contention in this case. Now, with respect to the necessity of the case, I have already explained that, in the view I take, such necessity did exist. And, with regard to the usage of navigation, the evidence seems to me to show, that, if the assured had done other than what they did, they would have pursued an unusual course: and the policies give express power to stay for all lawful purposes at Marseilles.

Now, to show that there is such a case, it appears to me only to be necessary to refer to the authority of Lord Wensleydale in *Biccard v. Shepherd*, 14 Moore's P. C. 471. I do not propose to go through the facts of that case, for in truth there is no similarity between them and the facts of the present case: but I refer to the judgment of Lord Wensleydale in order to show that there may be an insurance with a fluctuating warranty of sea-worthiness. The case is one of the highest authority, seeing that it is the unanimous judgment of the judicial *138] committee of the Privy Council. They felt that there was considerable difficulty in separating a voyage between interme-

diate ports from the voyage from the port of departure to the port of ulterior destination: but, after much consideration, they held that the sea voyage was to be divided into several periods, and that the warranty of sea-worthiness had reference to the condition of the vessel at those several periods. Lord Wensleydale, of whose great authority it is unnecessary to say anything, thus lays down the law:—"Some propositions in the doctrine of implied warranty of sea-worthiness, which form a part of every contract of marine insurance on voyages (for, to time policies it does not apply), are perfectly settled. They are laid down in the case of *Dixon v. Sadler*, 5 M. & W. 514, in which I gave the judgment of the Court of Exchequer, with the concurrence of my Brethren, founded on the principle laid down in several cases, —*Busk v. The Royal Exchange Assurance Company*, 2 B. & Ald. 72, *Walker v. Maitland*, 5 B. & Ald. 171 (E. C. L. R. vol. 7), *Holdsworth v. Wise*, 7 B. & C. 794 (E. C. L. R. vol. 14), 1 M. & R. 673, *Bishop v. Pentland*, 7 B. & C. 219, 1 M. & R. 49, and *Shore v. Bentall*, 7 B. & C. 798, n. 'There is an implied warranty in every insurance of a ship, that a vessel shall be sea-worthy, by which it is meant that she shall be in a fit state as to repairs, equipment and crew, and in all other respects, to perform the voyage insured, and to encounter the ordinary perils, at the time of sailing upon it.' " That is the general rule. If it be applicable here, of course there can be no doubt that the defendants are right, and they ought to succeed, because the warranty of sea-worthiness has not been complied with at Lyons in respect of the whole voyage. Lord Wensleydale continues: "If the insurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement *of men or state of [*139 equipment in different parts of it, as, if it was a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be, at each stage of the navigation in which the loss happens, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue sea-worthy." Therefore my Lord Wensleydale, evidently contemplating a case of this description, lays it down authoritatively that it is sufficient if the warranty is complied with by the ship being sea-worthy at and for each stage of the navigation.

Now, is it possible, dealing with the law of insurance, if reason and good sense are to have any weight, to say that the warranty of sea-worthiness is complied with if the vessel is in a sufficient state of preparation for each portion of the voyage, and yet that no time shall be allowed for making the necessary change in her state? It is only necessary to state the proposition in order to elicit the true answer from every person having any acquaintance with insurance law. If a change may take place, the owner is entitled to a reasonable time in which to effect that change. It appears to me, therefore, that the warranty of sea-worthiness was complied with here in respect of place, according to the principle above laid down, and which principle I am content to act upon.

We come next to the question of time. In disposing of the question as to the warranty of sea-worthiness, I have necessarily considered and disposed of the question of time so far as relates to deviation and

delay (other than deviation and delay imputed to the vessel called Papin No. 6) in respect of the repairs and alterations effected at Marseilles for the purpose of fitting the vessels for sea-navigation. But I have not disposed of the question whether or not the vessels did *sail on or before the 15th of August. That is a question *140] which requires a great deal of attention, because, with reference to the ordinary case of a vessel bound on a voyage from port to port, the law is settled, that a ship is not to be taken to have sailed unless she is completely equipped for the voyage upon which she is starting, and her equipment is not complete until she leaves her port of departure, everything having been done which is usually done to make her fit to proceed on her voyage. That is the ordinary rule; and it has been laid down in a great variety of cases to which reference has been made in the course of the argument,—more especially in the case of *Ridsdale v. Newnham*, 4 Campb. 111, 3 M. & Selw. 456, before Lord Ellenborough, where the insurance was from Portneuf to London, with a warranty to sail on or before the 28th of October, and the vessel left Portneuf before the day in question sufficiently equipped for her voyage of thirty-six miles down the smooth waters of the St. Lawrence to Quebec, where only she could obtain her clearances for the voyage, but with an incomplete crew for her voyage to London. So with respect to the case of *Pettigrew v. Pringle*, 3 B. & Ad. 514 (E. C. L. R. vol. 23), where the vessel had to get over the bar at the mouth of the river Ballyshannon, and take on board the thirty-five tons of ballast which was necessary for the purpose of making her ready for a sea voyage, and she did not take in that until after the time appointed for her sailing. It is sufficient to refer to these cases as being specimens of authorities in which it has been laid down as clear law, that a vessel is not to be considered as having sailed from her port of departure until she is ready to proceed upon the voyage insured. Upon that I conceive there is no doubt at all. On the other hand, I *141] conceive it to be equally clear that the utmost *extent to which those cases go, is that which is stated in that very ably and carefully compiled work, Phillips on Insurance, in which the learned author treats these cases as showing that a vessel cannot be said to “sail” from a port without having completed her equipment either there or at another place which is to be considered as forming part of the same port,—or, as he has it, “appended to the port for the purpose of preparing the vessel for her voyage.” But in none of those cases was there the necessity which exists here, of construing the warranty of seaworthiness with reference to each distinct part of the voyage: And here it was impossible that the vessel should leave the first port, the terminus à quo, in a state of preparation for any more than the stage of the voyage upon which she was to proceed immediately after leaving that port. And I must observe, that, in all those cases, the vessel was not seaworthy, that is to say, seaworthy in the sense of being completely equipped for the voyage, when she left the place at which it was held that the voyage did not commence. In the present case, however, having regard to the peculiar construction and application which it is necessary to give to the warranty of seaworthiness, the vessels had left Lyons before the 15th of August in such a state of preparation as it was necessary for them to be in, and in the

only state of preparation which they could reasonably be in, for the stage of the voyage succeeding their departure from Lyons. The same reasons which warranted the judgment of Lord Wensleydale in the case of *Biccard v. Shepherd*, 14 Moore's P. C. 471, as it appears to me, warrant the conclusion, that, where a vessel under circumstances of this description sails from the port named in a state of fitness for the first part of her voyage,—that being, as I have already pointed out, distinct from the *other portion of the voyage,— [142 she does sail in time if she leaves that port so equipped before the day named in the warranty. It appears to me that we should be acting inconsistently if we applied the authority of Lord Wensleydale to the warranty of sea-worthiness, and refused to be guided by it where it is strictly applicable in principle, as, to the warranty to sail on or before a given day.

It only remains for me to dispose of the point which was raised with respect to the vessel *Papin No. 6*. The facts as to that vessel, no doubt, raise a question altogether different from that which we have hitherto been considering, because it appears that she left Lyons on the 24th of July and arrived at Marseilles on the 29th. It follows from what I have already said, that, in my opinion, it was not necessary to put that vessel in hand so as to complete her equipment and make her ready to sail from Marseilles on or before the 15th of August. But it was necessary to use due and reasonable diligence in making her ready to start from the last-mentioned port. Now, the amount of diligence exercised with reference to the *Papin No. 6* appears to have had reference to the two other vessels, the *Bourdon*, which left Lyons on the 2d of August and arrived at Marseilles on the 7th, and the *Papin No. 1*, which left Lyons on the same day and reached Marseilles on the 8th. These two latter vessels appear to have been repaired with all the diligence which could have been applied to them. All three were ready on the 20th, and actually sailed from Marseilles on the 23d. Now, there is no doubt, upon the evidence, that the *Papin No. 6* might have been got ready before the 20th of August, and that the repairs of that vessel,—or rather the “outfit,” for “repairs,” which was the word used in the argument, is an incorrect one,—the outfit of that vessel *was not proceeded with with the same rapidity as that of the other two vessels, which arrived [143 at Marseilles some days later. The explanation which was given of that delay, was, that, considering the build of the vessels, and the nature of the voyage on which they were bound, it was considered to be advisable that they should sail in company; and there is no doubt that the owners did, with that object in view, keep back the outfit of the *Papin No. 6* for a few days. The question is, whether there is any evidence to show that that delay was a reasonable delay. If I had pressed the argument upon which I held that there was a right to do the repairs at Marseilles, having regard to the peculiar character and application of the warranty of sea-worthiness in this particular case, I must have held that the assured had a reasonable time in which to do those repairs; and what is a reasonable time would properly of course have reference to the time necessary to do what was required to be done. But that, I conceive, is not the only matter to which reference is to be made in order to determine the question of reason-

ableness of time. There may be circumstances affecting the safety of the vessel, or the convenient prosecution of the voyage, which may justify some delay. But that must be a question for the jury, having regard to all the facts laid before them. We have the evidence of a captain in the French navy,—the skill and courage of whose officers we have had too many opportunities of appreciating,—who stated he thought it but reasonable that the Papin No. 6 should wait until the other two vessels were ready. He gave as his reason, that he would not like to sail in one of these vessels without having the others in company; intimating that they were somewhat crank, and such as to the mind of a sea-going man of experience suggested such an amount *144] of peril as he would not be willing to *encounter without having assistance at hand. If that was the opinion of a man of such a character as used to be called in the old books a man of a constant mind,—not of mere caprice or timidity, but having a due regard to the safety of the vessel and the lives of her crew,—I cannot say that there was no evidence upon which a jury might properly hold that a prudent man uninsured would have waited the time that the captain of the Papin No. 6 did wait. I cannot, when I come thoroughly to consider the matter, bring myself to say that there was no evidence from which the jury might fairly come to the conclusion that there was no unreasonable delay. It is not desirable to withdraw questions of that sort from a jury, who, from their habits and general knowledge of business, are well qualified to deal with them.

Upon that point, therefore, as upon the others, I feel bound to come to a conclusion in favour of the plaintiffs, and to hold that the rule should be discharged.

BYLES, J.—I am entirely of the same opinion. My Brother Willes has gone so fully into the various points which were raised in this case, that it is unnecessary for me to say more than that I entirely concur in every part of his judgment. There is, however, one observation which may be made as to Papin No. 6. In addition to the consideration for the lives of the crew, which is an element which, I think, might fairly guide the judgment of the captain, I think it is plain upon the face of the policies that it was the intention of the parties that these three vessels should sail in company. I think the stipulation that the assured should have leave “to tow and be towed,”—bearing in mind that they are all steam-vessels,—necessarily imports *145] that they are to proceed in company; at all events, if *no extraordinary or unreasonable delay is to be occasioned thereby. Again repeating my adhesion to all that has fallen from my Brother Willes, I must say that I do not entertain any doubt as to the propriety of our decision.

Rule discharged.(a)

(a) See *Burges v. Wickham*, 32 Law J. Q. B. 17.

COLLINGWOOD *v.* BERKELEY and Others. *June 6.*

A prospectus of a projected company for the conveyance of emigrants to British Columbia contained statements calculated to induce intending emigrants to believe that arrangements had been perfected for the object in view, and inviting them to take tickets for their passage and the public to purchase shares. This prospectus was shown by the secretary to the defendants, and they were asked to allow their names to be inserted therein as directors; to which they consented, *on being qualified* (that is, presented each with 200 paid-up shares of the nominal value of 10*l.* each) *and indemnified*. Their names were accordingly inserted, and the prospectus published and advertised in the Times:—

Held, that, from these facts, the jury were warranted in inferring that one who contracted with the secretary for a passage, and paid his money, upon the faith of the representations contained in the prospectus, did so upon the credit of the defendants, and consequently that he was entitled to sue them for a breach of such contract.

THIS was an action for the breach of an alleged contract by the defendants to carry the plaintiff from London to British Columbia.

The first count of the declaration stated that the defendants were directors of a certain company called The British Columbia Overland Transit Company, and that they falsely and fraudulently represented to the plaintiff that the said company would, in the month of May, 1862, despatch a party of passengers from England per steamer to Canada and over the Grand Trunk railway to Chicago and St. Paul's, and viâ the Red River Settlement, in covered wagons, four-horsed, to British Columbia; also that a large escort would accompany the passengers, and due provision would be made for victualling, and that the fare or passage-money for each passenger from England to British Columbia aforesaid would be the sum of 42*l.*, and that *one [*146 James Henson was secretary of the said company: Averment, that, believing the said representations to be true, and relying thereon, the plaintiff was induced to pay to the said James Henson, as such secretary of the said company, and the said James Henson, as such secretary, accepted and received from the plaintiff, the sum of 42*l.* as and for the fare or passage-money for the conveyance of the plaintiff from England to British Columbia by the means and in the manner hereinbefore set forth; and that all conditions were performed and fulfilled, and all things happened and were done, and all times had elapsed necessary to entitle the plaintiff to be conveyed to British Columbia aforesaid by the said company, and to maintain this action: Breach, that the defendants did not convey the plaintiff to British Columbia or to any other place beyond St. Paul's aforesaid, and no covered or other carriages, four-horsed or otherwise, were provided by the defendants for the conveyance of the plaintiff to British Columbia aforesaid, nor was there any escort provided to accompany the plaintiff as such passenger as aforesaid, nor was any provision made for victualling the plaintiff as such passenger as aforesaid, as the defendants well knew.

The second count stated that the defendants and divers other persons issued, published, and circulated, and caused to be issued, published, and circulated certain prospectuses or advertisements, in which it was, amongst other things, stated and represented that the defendants and divers other persons were directors of a certain company called The British Columbia Overland Transit Company, Limited, and that one James Henson was the secretary of the said company, and that the

promoters of the said company had organized a certain route from Canada to British Columbia, and would forthwith organize a perfect land-transport train *of horses and spring-carts adapted for passengers and goods traffic, and that instructions had been sent out to its agents, by which the route would be placed in a perfect state, and would in the month of May, 1862, despatch a party of first and second-class passengers by the said route from England to British Columbia: Averment, that, believing the statements and representations in the said prospectuses or advertisements, and relying thereon, the plaintiff was induced to enter into a certain contract or agreement with the said James Henson as the secretary and on behalf of the said alleged company, for the conveyance by the said alleged company of the plaintiff to British Columbia by the route aforesaid, and to pay to the said James Henson as such secretary the sum of 42*l.* as and for the passage-money or fare of the plaintiff: Breach, that the defendants, in and by the said statements and representations thereinbefore mentioned, deceived and defrauded the plaintiff in this, that, at the time of making the said statements and representations, no company had been established called The British Columbia Overland Transit Company, Limited, and no route had been organized from Canada to British Columbia by the alleged promoters of the said alleged company, and no means had been taken or were intended to be taken to organize a land-transport train of horses and spring-carts, and instructions had not been sent out to the agents of the said alleged company, by which the said alleged route would be placed in a perfect state,—all which the defendants well knew; and that the plaintiff was not conveyed to British Columbia aforesaid in pursuance of the said contract or agreement with the said James Henson as such secretary as aforesaid, but only to St. Paul's aforesaid.

*148] The third count stated, that, on the 17th of May, *1862, in consideration of the sum of 42*l.* then paid to the defendants by the plaintiff, the defendants agreed with the plaintiff to carry and convey the plaintiff from England to British Columbia, by way of St. Paul's, and that from St. Paul's aforesaid to British Columbia aforesaid a large train of horses and wagons, accompanied by a numerous escort, should and would start with the convoy; also that parties should and would be sent in advance to collect at stated points extra provisions, while cattle would be driven to those stations; and that all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to a performance of the said agreement by the defendants and to maintain this action for the breach thereof hereinafter alleged: Breach, that the defendants did not carry and convey the plaintiff from England to British Columbia aforesaid by way of St. Paul's aforesaid or otherwise, and no train of horses and wagons accompanied by a numerous or any escort were provided by the defendants or any other person or persons to start from St. Paul's aforesaid to British Columbia aforesaid, and the defendants did not send any person or persons from St. Paul's in advance, for the purposes above stated or any of them; whereby and by means whereof the plaintiff was compelled to remain and stay at St. Paul's aforesaid for a long time, to wit, seven days, and was unable to proceed to British Columbia afore-

said, and lost divers large profits and gains that he otherwise would have made at British Columbia aforesaid, and was compelled to leave St. Paul's aforesaid, and was put to expense, to wit, the sum of 100*l.*, in returning to England.

There was also a count for money paid, money received, and money found due upon accounts stated.

The defendants severally pleaded in substance as *follows,—
first, to the first and second counts, not guilty,—secondly, to [*149 the first count, that they were not directors as alleged,—thirdly, to the third count, that they did not agree as alleged,—fourthly, to the third count, that the plaintiff did not pay the said sum, or any part thereof, to them as alleged,—fifthly, to the residue of the declaration, never indebted. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were in substance as follows:—

In the Spring of 1862, a gentleman who called himself Colonel Sleigh proposed to form a company, with limited liability, for the conveyance of emigrants to British Columbia, appointed a secretary, took offices in the city, and issued a prospectus to the following effect,—

"British Columbia Overland Transit Company, Limited (with anticipated legislative, colonial, and government postal subsidies or guaranties of 6 per cent.). To be incorporated under the provisions of the Joint-Stock Companies Acts of 1857 and 1858. Capital, 500,000*l.* sterling (with power to increase to one million), in 50,000 shares of 10*l.* each. Deposit, 1*l.* per share on application, and 1*l.* 10*s.* on allotment. No further call without three months' notice, except by consent of a general meeting of the shareholders.

"Board of Directors,—The Hon. F. H. Fitzhardinge Berkeley, M. P., Henry Fenton Jadis, &c., &c.

"Bankers,—Bank of London, Threadneedle Street, E. C.; Robarts, Lubbock, & Co., 11 Mansion House Street, E. C.

"Solicitors,—Messrs. Prichard & Collette, 57, Lincoln's Inn Fields.

"Offices,—6, Copthall Court, Throgmorton Street.

"Secretary,—James Henson, Esq.

*"The only drawback to the future greatness of the country, [*150 is, the distance by sea from Europe,—five months *viâ* Cape Horn, and forty to fifty days by steam *viâ* Panama. To obviate this and at once give an impetus to immigration, and by which a continuous stream of settlers will hasten to British Columbia, the overland route from Canada, passing direct through British territory, has been arranged by the promoters of the Overland Transit Company. Several surveys have resulted in tracing a direct road, which, with a perfect organization of land transport, is at once available. From Europe, settlers will proceed to Canada, and thence direct by steam to Fort William, or, as afterwards explained, to Fond du Lac, Lake Superior. From thence the route proceeds to the Red River Settlement, and onwards direct through a lovely prairie country to British Columbia by the route indicated in the following extract from the report of Governor Douglas, printed in the Blue Books of 1860, and laid before parliament,—'From Lytton, a central point in British Columbia, a

natural road now exists, leading to Red River Settlement, by the Contannais Pass, through the Rocky Mountains, and from thence following the Valley of the Saskatchewan, chiefly over a prairie country of great beauty, replete with game. A settler may take his departure with his cattle and stock, and reach British Columbia by that road. This is no theory; the experiment having been repeatedly made by parties of Red River people travelling to Colville, British Columbia, from whence there is a good road to Lytton; so much so, indeed, that persons assured me that the whole distance from Lytton to Red River may be safely travelled with carts. Lytton is a town situated in the centre of the gold district of British Columbia, near Fort Hope on the Frazer River.*

*[151] "This corporation will forthwith organize a perfect land-transport train of horses and spring-carts adapted for passengers and goods traffic, and erect log-shanties for light stabling and refreshment at stated intervals along the entire route. Cattle and provisions will be collected at these stations, and armed mounted escorts will be formed for convoy. By the arrangements already in a state of forwardness in Canada from instructions sent out to agents, there can be no question but that the route will be placed in a perfect state, ready to meet the requirements of an enormous immigrant traffic. Applications have been made direct to the legislative council of British Columbia, and to the government in Canada, for local charters which shall secure for this company exclusive privileges for several years to come. Both Canada and British Columbia have offered large inducements to the promoters of an overland route such has been organized by this company. It is estimated that by the express carts of this corporation, the distance from Lytton or Fort Hope on the Frazer River, British Columbia, to Lake Superior, the head quarters of steam navigation, will be performed in twelve days. Hence, Europe could be reached from British Columbia in, say, twenty-five days. As the route from Fort William, Lake Superior, to Red River Settlement, would require some delay to be put in a state for cart traffic, the Overland Transit Company propose for the first twelve months that passengers should proceed by steamer to Fond du Lac, Lake Superior, and thence up the St. Louis river, and thence by express carts to the junction of the Sioux Wood and Red River (two hundred miles), from thence in small river steamers to Assiniboine, Red River Settlement (one hundred and eighty miles). Small steamers, especially adapted for this navigation, can be constructed for 5000*l.* a piece.

*[152] From Assiniboine to Elbow Forks of the S. Saskatchewan (a) (five hundred miles), from Elbow to Fort Hope, on the Frazer River, British Columbia, viâ the Vermillion Pass of the Rocky Mountains (seven hundred miles). Hope Town is connected by steamers with Victoria. Total distance from Fond du Lac, fifteen hundred and eighty miles, about two hundred miles of which will be travelled in steamers; and probably more steamers will ultimately be put upon the S. Saskatchewan, by which three hundred miles more could be travelled in steamers; thus reducing land travel by five hundred miles, being about one thousand miles for the express carts. While

(a) Sir George Simpson, the governor of the Hudson's Bay Company, travelled between Red River and the S. Saskatchewan on a well-defined track over the plains with a cart.

the United States overland route from St. Louis to San Francisco is two thousand seven hundred and sixty-five miles, the British Transit Company's route is only fifteen hundred and eighty miles, showing a saving of distance in favour of the latter of above one thousand miles, and a saving of ten days in time.

"To obviate the necessity of the slightest delay in opening up the first portion of the route to the Red River Settlement, reciprocal arrangements are in course of completion, by which this company can without any delay forward its passengers to Detroit, and from thence to Chicago, by railroad, and thence per rail to La Crosse, on the Mississippi. There are two trains daily between Chicago and La Crosse (time thirteen hours), and from thence there are two lines of steamers to St. Paul's (time from Portland or Quebec to St. Paul's, three days). Sail and steam distance, 1358 miles; and in winter stage-coaches from La Crosse to St. Paul's. From St. Paul's there is an excellent *and well-travelled road, connecting with the Red River Settlements, viâ Pembina, to Assiniboine. [*153

'Estimating the receipts from first-class passengers by the postal express, and from second-class passengers and emigrant escort-trains, the revenue would amount to above 300,000*l.* per annum, adding the revenue from return passengers, parcels, gold, goods, and emigrant escorts, and calculating also the freightage on gold-dust which would be transported by this route to Europe, deducting working expenses, estimated upon the basis of the United States overland transport express from Missouri to San Francisco, there would be a profit of fully 100,000*l.* per annum, irrespective of postal revenue or colonial subsidies. Escort-trains for emigrants will be organized on a less expensive scale of charge, and by which British Columbia be will reached in about a month, at a cost of about 10*l.* from Canada, or less, per adult head.

"This great national undertaking cannot fail to be appreciated by a British public, standing second to none in commercial enterprise and patriotic devotedness to the future greatness of the British empire.

"It is a question of great importance, whether by this route Australia and China cannot be reached a month sooner by saving of time than by the existing routes. Such is the opinion of some first-class authorities."

After referring to "the banking business of the corporation," the prospectus concluded as follows:—"The British Columbia Overland Transit Company, Limited, is enabled to start with the full advantages of the act by which the liability of the shareholders is strictly limited in each case to the amount of their shares:" and it was signed, "James Henson, Secretary."

This prospectus was shown to Mr. Berkeley (who was one of the members for Bristol), and Mr. Jadis (who held an appointment in the office of the board of *trade), by Henson, and they authorized its publication with their names in it: and on the 1st of April [*154 Mr. Berkeley, in a letter addressed to Henson, wrote,—“On the distinct understanding that I am indemnified and qualified” (that is, by having 200 shares, nominally paid up, appropriated to him), “I have no objection to belong to the British Columbia Overland Transit Company and Banking Corporation, Limited.”

In the Times of the 28d and 26th of May, 1862, two letters appeared,

complaining of the hardships which passengers who had been induced to travel by the company's route had had to encounter, and commenting in strong terms upon the conduct of the promoters, the chief of whom (and probably the only one) had then been discovered to be Colonel Sleigh. The matter also underwent considerable discussion in the House of Commons. This produced from Mr. Berkeley the following letters, addressed to Henson,—

May 26, 1862. "In the House I consulted Mr. Chichester Fortescue, and he considered that it were best that I should merely watch proceedings, and come in if the thing looked serious. It did not. At the same time, I should like to know what reasonable probability there is of overcoming the difficulties related in the Times of to-day. It will not do to let our emigrants eat horses and dead dogs. Colonel S. is not viewed with much confidence by government nor by the public, I assure you."

May 30, 1862. "Please to withdraw my name from the British Columbia Emigration Company at once. I am not at all satisfied with the arrangements, and decline to belong to it."

May 30, 1862. "Representing a great mercantile constituency, I doubt whether my name appearing in so many companies is prudent. As regards the Columbia, I have already written to withdraw my *155] name. *I do not desire to injure the prospects of the company: but, after the present time, my name must not appear. I hear the most unpleasant reports; and Colonel Sleigh's name is not a tower of strength sufficient to stem public opinion.

"P. S. Please take no steps in any companies for me until we meet."

Upon the faith of the statements contained in the prospectus, the plaintiff (with many others) on the 17th of May, 1862, agreed with Henson, the secretary, for a passage to British Columbia, for which he paid Henson 42*l.*; but, when the train arrived at St. Paul's, it was found that no further progress could be made, no arrangements having been made for carrying the passengers on to their destination; and, after enduring many hardships and privations, some of them,—the plaintiff amongst the rest,—found their way back to England in a state of almost utter destitution.

Henson, who was called as a witness, stated that he showed the prospectus to Mr. Berkeley, Mr. Jadis, and the others, and asked them if they would consent to become directors of the proposed company, and that they all assented to do so; and thereupon he inserted their names, and the prospectus was published and advertised in the Times for several weeks. He further stated that all the money which he received from passengers and for deposits (about 1500*l.* in the whole) was paid in to the account of Colonel Sleigh at the West End Bank.

There was no evidence that either Mr. Berkeley or Mr. Jadis had ever been to the offices of the company, or had seen the advertisements, or taken any active part in the promotion of the concern; and both swore that they never intended to authorize Henson to enter into any contracts upon their credit until the company was fairly formed *156] and all the arrangements for *the transit of passengers perfected. The only evidence to fix Jadis, was, that he had written to Henson, assenting to be named a director "on being qualified and

indemnified," and that, in a letter addressed to a third party, he stated that he was a director of the company.

On the part of the plaintiff it was submitted that the defendants, by consenting to become directors, had authorized Henson to make contracts for the furtherance of the scheme, and that for the breach of those contracts they were liable, if not for the false and fraudulent representations contained in the prospectus. For the defendants, on the other hand, it was contended that they had never authorized Henson to enter into any contracts in their names, and that all they contemplated, was, to become directors of a company to be commenced when all the arrangements referred to in the prospectus had been fully carried out.

The jury returned a verdict for the plaintiff, damages 160*l*.

Montague Smith, Q. C., in Easter Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant Berkeley "on the ground that he had given no authority to any one to enter into the contract, and that there was no evidence of such authority;" or for a new trial on the ground that the verdict was against evidence.

Daly at the same time obtained a similar rule on behalf of the defendant Jadis.

Shee, Serjt., and *Pigott*, Serjt., showed cause.—There was abundant evidence to show that during the months of April and May, 1862, both Mr. Berkeley and Mr. Jadis were with their consent held out as members and directors of the company in question. The letters *of the former in particular are those of a man who has con- [*157
sented to take his chance of any advantage that might accrue to him from the scheme if successful, and, when he sees the prospect of responsibility, seeks to repudiate the acts of those who have traded on the respectability and influence of his name. Both clearly allowed themselves to be held out to the world, and to those who, like the plaintiff, wished to avail themselves of the facilities of transit promised by the prospectus, as persons under whose sanction and authority Henson was acting. The present case does not differ in any material respect from that of *Doubleday v. Musket*, 4 M. & P. 750, 7 Bingh. 110 (E. C. L. R. vol. 20). There, the defendants consented to become directors, bought shares, and attended meetings of a projected water company, for which it was contemplated that an act of parliament should be obtained; having done no act to divest themselves of their interest in the concern, it was held, that, though no act of parliament was obtained, and the project failed, they were responsible for works ordered at subsequent meetings of the directors which the defendants did not attend. *Tindal*, C. J., there says: "The contract was entered into on the 16th of January, 1826: it consisted of a tender sent in by the plaintiff on that day in consequence of an advertisement inserted on the 7th in a Brighton newspaper by order of the directors. Let us see the situation of these defendants at the time of that advertisement, —whether they were at that time directors, or had allowed themselves to be held out to the world as such: for, by the terms of that advertisement, the directors of the company became liable for the work in question. The advertisement was as follows:—'The directors of the Brighton Water Company are ready to receive proposals for excava-

ting and removing the earth and chalk for forming one or more reservoirs,' &c. If, *then, the defendants by their conduct authorized *158] the publication of that advertisement, they are equally liable with the rest of the directors. It appears that they accepted the office of directors, attended at several meetings of the directors, and purchased the number of shares requisite to qualify them to act in that capacity. They were therefore not only directors, but were actually interested in the funds of the concern. It is sufficient, however, to say that they were directors, and acted as such. Having retained their character of directors up to the month of September, 1825, what have they since done to divest themselves of that character? It certainly was competent to them at any time to retire from the direction: but, unless they have expressly done so, and have allowed their names still to be used, they must take the consequences: they stand in the like situation with the members of a partnership, who, after they have seceded from the firm, still allow their names to remain exposed to view over a shop door. It has been contended, on the part of the defendants, that, in incurring the liability in question, the directors exceeded their authority as directors, inasmuch as the prospectus held out that an act of parliament would be applied for to regulate the concerns of the company. No doubt such a course would be more convenient for the government of such a body, as they would thus obtain power to lay down pipes, to sue and be sued in the name of one of their officers, and the like: but it nowhere appears that the obtaining of an act of parliament was held out as a condition precedent to the formation of the company; neither does the advertisement say anything about an act of parliament. It is true that the prospectus stated that an act would be applied for: but it was clearly understood that the works were to go on in the mean time." So, here, *159] it clearly was intended that *the business of this company should go on before any actual incorporation.

Montague Smith, Q. C., and Kingdon, for the defendant Berkeley.—There was no evidence to fix Mr. Berkeley with having given any authority to Henson or any other person to enter into the contract declared upon. All that appears, is, that Henson called upon Mr. Berkeley and asked him to allow his name to be inserted as a director of a company *about to be formed*. The usual prospectus was issued, describing the objects proposed to be attained, and describing the company as being intended "to be incorporated under the Joint-Stock Companies Acts of 1857 and 1858." No shares were ever issued: nor was anything done towards the formation of a company. Advertisements, it is true, appeared in the public papers, and money was received: but all this was done by Henson as the tool of Colonel Sleigh. Not a farthing was ever paid in to any banking-account of the company. Mr. Berkeley seems for the first time to have become aware that Colonel Sleigh was interfering in the concern on the 22d of May, 1862; and on the 30th he wrote to Henson telling him he would have nothing more to do with it. The fact of Mr. Berkeley consenting to become a director upon the terms contained in the prospectus, gave no authority to Henson to use his name otherwise than for the purposes of a company when formed and incorporated. [ERLE, C. J.—You contend, that, as between Mr. Berkeley and the plaintiff,

the latter had no right to conclude that the issuing of tickets for the transit to British Columbia was accredited by Mr. Berkeley?] Exactly so. The question is as to the extent of the real authority which Mr. Berkeley gave to Henson. [BYLES, J.—And also the extent of the apparent authority induced by the acts of Mr. Berkeley.] There was *neither original authority nor subsequent ratification. The concluding sentence of the passage cited from the judgment of [*160 Tindal, C. J., in *Doubleday v. Musket*, shows that that case has no application here. In *Bourne v. Freeth*, 9 B. & C. 632 (E. C. L. R. vol. 17), 4 M. & R. 512, it being in contemplation to form a company for distilling whisky, the following prospectus was issued in May, 1825,—"The conditions upon which this establishment is formed, are, the concern will be divided into twenty shares of 100*l.* each, five of which to belong to A. B., the founder of the works; the other fifteen subscribers to pay in their subscriptions to M. & Co., bankers, Liverpool, in such proportions as may be called for: the concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October: 10 per cent. to be paid into the bank on or before the 1st of June next." It was held that this prospectus imported only that a company was to be formed, not that it was actually formed; and that a person who subscribed his name thereto, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company. [WILLIAMS, J.—That case, as well as *Fox v. Clifton*, 4 M. & P. 676, 6 Bingh. 776 (E. C. L. R. vol. 19), *Reynell v. Lewis* and *Wyld v. Hopkins*, 15 M. & W. 517 and several others, are cited in *Smith's Mercantile Law*, 5th edit. 104, as authorities for this proposition,—“The liability of a member,”—that is, of a joint-stock company,—“commences with the commencement of the company, and he is not responsible for contracts made before that period by its intended members or directors, while preliminaries on the accomplishment of which he had agreed to join the *company are unaccomplished.”] In *Burnside v. Dayrell*, 3 [*161 Exch. 224, where an allottee in a projected railway company had paid his deposit into the bank named in the prospectus, which had been circulated with the defendant's sanction, his name appearing therein as one of the provisional committee-men and as chairman of the committee of management; but the defendant had not personally superintended the allotment of shares, and had taken no active part in the concern, and had been present once only at any meeting, when he acted in the capacity of chairman, but dissented from the proceedings: in an action by the plaintiff against the defendant for the recovery of his deposit, on the abandonment of the scheme, it was held that the defendant was not liable. So, in *Barker v. Stead*, 3 C. B. 946 (E. C. L. R. vol. 60), it was held that one who merely assents to his name being published in a list of a provisional committee of a projected railway company, does not thereby impliedly authorize the secretary or any one else to pledge his credit for goods supplied to or work done for the company. [WILLES, J.—There are more recent cases which are not quite consistent with your argument. The fact

of the party being a director is more stringent than the fact of his being a member of the provisional committee.] In *Cooke v. Tonkin*, 9 Q. B. 936 (E. C. L. R. vol. 58), the defendant was by his consent a member of the provisional committee of a projected company: according to the prospectus, the affairs were to be under the control of a managing committee: a managing committee was appointed, and then the provisional committee ceased to act: after this, the solicitor to the company, who had been appointed by the provisional committee, gave orders for the publication of advertisements. In an action against the defendant for the expense of inserting these, it was proved that he had twice attended meetings of the provisional committee, *162] but that he was not on the managing committee, nor a shareholder: and it was held that these facts constituted no evidence for a jury, of the defendant having authorized the insertion of the advertisements, nor of his liability. In *Bright v. Hutton*, 3 House of Lords Cases 341, A. was a member of the provisional committee of a projected railway company which had been provisionally registered, and the affairs of which were put under the authority of a managing committee: he accepted shares, and paid a deposit on them, but did no further act; and the scheme was abandoned. It was held that on these facts he was not liable to a creditor for business done under the orders of the managing committee towards completing the projected undertaking and converting the association into a regular company, and consequently that he was not liable as a contributory under the winding-up acts. [WILLES, J.—Is that consistent with *Hutton v. Upfill*, 2 House of Lords Cases 674?] That case is observed upon by Lord St. Leonards in *Bright v. Hutton*, 3 House of Lords Cases 388. The real question here is, whether the defendants gave any authority for the doing of what was done, or held themselves out to the world as having given such authority,—for, since the cases of *Reynell v. Lewis* and *Wyld v. Hopkins*, the question has been properly treated as one of agency, and not of partnership. There is nothing in this prospectus calculated to induce any reasonable man to assume that the directors authorized anything to be done or any contracts to be entered into before the projected company was actually formed.

Daly, in support of *Jadis's* rule, submitted that there was no evidence whatever to affect him. *Cur. adv. vult.*

*163] *WILLIAMS, J., now delivered the judgment of the court: (a)—

Upon this rule the question has been whether there was any evidence for the jury, that the defendants were liable on the contract stated in the declaration.

The contract was made between the plaintiff and Henson. Henson had given to the plaintiff a prospectus describing the defendants, among others, as directors of the company therein mentioned, and himself (Henson) as secretary: and the plaintiff stated that he was induced, after reading that prospectus, to make the contract in reliance on the credit of Mr. Berkeley and another as directors.

Now, was there any evidence that the defendants had authorized Henson to make the contract for them, or that they by their permission were held out to the plaintiff as parties to the contract with him?

(a) The case was argued before Erle, C. J., Williams, J., Willes, J., and Byles, J.

The defendants contended that the prospectus contained merely a proposal to form a company, and that their consent to become directors was only conditional in case the company should be formed and registered, and that they had never attended at the offices or acted in the directorship, and that there was no evidence that they held out to the plaintiff that business would be carried on by their authority until the above conditions had been fulfilled.

But we are of opinion that there was evidence to support the verdict.

The prospectus, although it speaks of a company to be formed and registered, yet it also speaks of business actually going on for the purpose of transport,—of past arrangements,—of matters in a course of completion,—and of actual transport as about to commence forthwith (that is, when the prospectus was issued). It *states, "that [164 the overland route from Canada has been organized by the promoters of the Overland Transit Company. Several surveys have resulted in having a direct road, which, with a perfect organization of land-transport, is at once available." Then, after describing the route, it proceeds,—“The corporation will forthwith organize a perfect land-transport train of horses and spring-carts adapted for passengers and goods, and erect log-shanties at intervals, &c.; and cattle will be collected at these stations.” “By the arrangements already in a state of forwardness in Canada, from instructions sent out to its agents, there can be no question but that the route will be placed in a perfect state. Applications have been made to the legislative councils of Columbia and Canada for charters,” &c. “As the route from Fort William to the Red River would require some delay to be put in a state for traffic, the Overland Transit Company purpose, for the first twelve months, that passengers should proceed to Fond du Lac,” &c., &c. “And, to obviate the necessity of the slightest delay in opening up the first portion of the route to Red River, reciprocal arrangements are in a course of completion, by which this company can without any delay forward its passengers to Detroit, and thence to Chicago, and thence to St. Paul’s. “The British Columbia Overland Transit Company is enabled to start with the full advantages of the act for limited liability, and may fairly expect to receive large dividends.”

These passages express to an ordinary reader that operations respecting transport had been and were then in the course of being carried on. To a technical reader, there are expressions which might raise suspicion; such as the variety of names, “company,” “corporation,” “promoters:” but the jury, from the words and circumstances, had a right to infer that it *was intended to induce passengers to pay [165 fares for immediate transport, and applicants for shares to pay immediate deposits: and, if so, there is evidence that the defendants were by their consent held out as directing that concern, and therefore bound by contracts connected therewith made in a regular course of business.

There is nothing to show that the company had not been incorporated, or might not be at any moment. Also, there is nothing showing that the company would not act, as it lawfully might, before incorporation: and there is evidence to show that the words were

intended to represent arrangements for transport actually existing; for, the plaintiff states that he found arrangements made as described. His evidence in effect is, that he was carried smoothly under the described arrangements as far as St. Paul's, and might have been carried on to his destination, if the company had been in credit with their correspondents there who were expected to supply horses and carts from thence, and who refused to act because they would not take bills on the company for their services, but required cash.

The conduct of the defendants in accepting the office of directors, warranted the jury both in adopting any construction of the prospectus which the words would bear to support the plaintiff's claim, and also in disregarding the argument for them founded on the want of notice of the proceedings in Cophthall Court.

The evidence relating to that conduct on the surface is very concise. Henson showed the prospectus, and asked each, "Will you be a director?" Each in effect answered, "Yes, provided I am qualified and indemnified." This is all that is on the surface. But beneath there was matter of deep significance for the jury to consider. There *166] was some evidence that schemes for *companies abounded: every letter refers to more than one; and Mr. Berkeley, in a letter, observes to the effect that he was a director of so many that his estimation would be perilled with his constituency. There was also some evidence that men of established credit, willing to sell the use of their names as directors to the projectors of these schemes, abounded also. The language and the manner used on the occasion, that is to say, a short question and answer, showed that the transaction was of frequent occurrence.

There was no inquiry of the nature of the scheme, or of the character of Henson or of his principal, and no indication that either defendant ever intended to employ either thought or money in furtherance of the scheme, whatever it might be. The truth was, that Colonel Sleigh, a schemer in discredit, wished to obtain the cash of the unwary upon a prospect of a land transport to Columbia. This purpose might be effected, if he could hold out men of credit as directing it. Mr. Berkeley, from his position in parliament, and Mr. Jadis, a government officer, in the department of the Board of Trade, would give assurance that the scheme was sanctioned by honour and sense and money. Therefore Colonel Sleigh sent to buy the use of their names; and they sold it to him for an indemnity and a premium, possibly of the value of 2000*l.*, to be taken from the funds of the company; that is, they were to have Colonel Sleigh's indemnity against any responsibility caused by the use of their names, and, if Colonel Sleigh by that use raised the whole or a sufficient part of the projected capital of 500,000*l.*, they were to receive each 200 paid-up shares of 10*l.* each.

This transaction of the prospectus bears the meaning here attributed to it. It authorized Henson or Sleigh to hold out that the defendants *167] were really directing them *in obtaining fares from emigrants for transport and deposits from applicants for shares. As against these defendants, the jury were warranted in deciding that they did whatever Henson by their authority represented they were doing, within the limits of the operations described in the prospectus,

and that therefore they were liable on the contract, within those limits, which Henson made for them on the credit of their names.

It is a rule, that, when one of two innocent parties is to suffer by the fraud of a third, he who gave occasion for the fraud should bear the loss. Upon this principle, the decision ought to be against the defendants, if there was a balance. The plaintiff is certainly an innocent party; but the defendants, though not guilty of direct fraudulent intention, gave the occasion which made the fraud successful.

The jury were also warranted in thinking that the conduct of the defendants after the interview with Henson, indicated that they had intended all along to leave the management of the affairs of the company to the direction of the projectors, without interference on their part. Upon any other supposition, it is strange that men in the position of these defendants, living in London, if they intended to be real directors, should not during two months make a single inquiry about their company, or visit the offices, or send for Henson to know what was going on. Strange, also, that their names should be advertised in the Times for weeks, and they should not see it, and no one should mention it to them, unless the nature of the transaction was understood to be as last described. Still more strange, that neither of the defendants interfered to inquire or remonstrate, when it was known that contracts in their names had been made for transport, and that the hardships and perils so shocked the *humanity of strangers as to produce the letters signed "West Canada," and the interference of a member in parliament to endeavour to save the emigrants from their fate. Mr. Jadis did nothing. Mr. Berkeley in his letters expresses neither suspicion nor dissent in respect of the contracts made: and those letters result in merely withdrawing his name from the directorship, for the sake of avoiding responsibility after that date,—leaving the liability for transactions previous to that date as it might be established. The jury may have thought that the defendants had trusted all arrangements to the discretion of the projector, and that therefore they must trust now to an indemnity from him against the responsibility brought by him on them. [*168]

The facts of this case are peculiar, and differ materially from those that have been cited; so that it is not worth the time to analyze them further than to say, that in *Doubleday v. Muskett*, 7 Bingh. 110 (E. C. L. R. vol. 20), 4 M. & P. 750, two directors of a proposed company were held liable for contracts made by the board without their knowledge before the company was formed, because they had consented to a commencement of the works of the intended company. Here, the defendants, as directors, according to one construction of the prospectus, had represented that the works of the intended company had been and were in operation. In *Bourne v. Freeth*, 9 B. & C. 632 (E. C. L. R. vol. 17), 4 M. & R. 512, the defendant was a real shareholder, who had really paid up a deposit, and belonged to an entirely different class from that of these defendants; and a decision in his favour is of no avail for these defendants.

The question before us has been confined to the claim for breach of contract: and we think the plaintiff has a right to recover an indemnity upon a count in form *ex contractu*; and it is not relevant now to

*169] *inquire whether he could have recovered the same indemnity in form *ex delicto*, for holding out false representations, to the damage of those who acted on them.

It may be true that the defendants did not themselves speak what they knew to be false, and nevertheless they may be liable for holding out false representations: and, if it was supposed that the Chief Justice had expressed an opinion upon the law to the contrary of this at the trial, his meaning was not understood. Rule discharged.

END OF TRINITY VACATION.

*170] *IN THE EXCHEQUER CHAMBER.

SIR JOHN BROCAS WHALLEY SMYTHE GARDINER, Bart.,
v. ELIZABETH JANE JELlicoe, Widow. July 4.

Judgment of the Common Pleas (12 C. B. N. S. 568) affirmed.

THIS was an appeal against a decision (by a majority) of the Court of Common Pleas, making absolute a rule to enter a verdict for the plaintiff in an action of ejectment brought by him to recover the possession of certain lands in the county of Lancaster, called "The Clerk Hill Estate," which he claimed to be entitled to under the will of his grandfather, Sir James Whalley Smythe Gardiner, Bart., deceased.

The appeal was argued on the 19th and 20th of June, 1863, before Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Blackburn, J., by

Sir Hugh Cairns, Q. C. (with whom were *Manisty*, Q. C., and *Udall*); for the appellant, the defendant below, and by

The Solicitor-General (with whom were *Mellish*, Q. C., and *Quain*), for the respondent, the plaintiff below.

The Court took time to consider; and their unanimous judgment was now delivered by

POLLOCK, C. B.—We are all of opinion that the judgment of the court below should be affirmed.

*171] As to the first point made by Sir Hugh Cairns for *the defendant, it seems to us that the estates limited by the deed of 1814 were legal estates. The parties seised of the legal estate convey expressly to the use of Robert and his sons, and then to the uses declared in the will of the testator, which are clearly legal uses, to which the trustees having the legal estates are by the will directed to limit the legal estate. This could hardly be denied, except as to the estates to arise under the shifting-clause; and, even if the estates to arise under that clause were merely equitable estates, as the preceding estates are clearly legal, the result would be that the plaintiff claiming under a limitation of the legal estate would be entitled to succeed in this ejectment, and the defendant's remedy under the shifting-clause would be in equity only.

We think, however, that the deed is intended and does carry out

the meaning of the testator, by conveying the legal estate to releasees to uses, so that the legal estate may vest as the uses arise, in the events upon the happening of which the estates directed by the will to be limited arise, and which are clearly intended by the will to be legal estates: and we think that this extends to the estates to arise under the shifting-clause, as well as to the other limitations.

As to the second point, which is the real question in the case, we agree with the construction put upon the shifting-clause by the majority of the court below. We think that the real construction is, that, in the event of the estates coming together, within the meaning of the shifting-clause (whatever be the construction of the words "coming to the possession"), the person next in remainder is to come in as if the person who would otherwise have come into possession were dead without issue; so that the real effect of the clause is, to let in the person who would be next in remainder if the person who otherwise would have had both *estates were dead without issue; in other words, to accelerate the next remainder. [*172]

We think that it would be a strained construction, to hold that the words "that the person next in remainder," &c., should come in "as if the party were dead without issue," meant that the whole will should be treated as if the person were actually out of existence without issue for all the purposes of the will: and we do not think that the testator would have been likely so to have directed, if he had contemplated that he would thereby be excluding female issue, who would never have taken the Gardiner estates, but who could come in under the very limitation now in question.

We think that the meaning of the words "the person next in remainder," &c., is, that such next remainder is to come into play, and that the remainders over continue unaffected and are to arise according to the limitations, subject to be divested again by the operation of the shifting-clause, if that clause should come into operation by the estates again coming together within the meaning of the shifting-clause.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS

IN

Michaelmas Term,

IN THE

TWENTY-SEVENTH YEAR OF THE REIGN OF VICTORIA. 1863.

The Judges who usually sat in banco in this Term, were,—

ERLE, C. J.,
WILLIAMS, J.,

BYLES, J.,
KEATING, J.

HANS RINGLAND, the younger, by WILLIAM RINGLAND his
Prochein Amy, v. JOSEPH LOWNDES, Clerk of the Burslem
Local Board of Health. Nov. 14.

A party who attends before an arbitrator, though under protest, cross-examines his adversary's witnesses, and calls witnesses on his own behalf, thereby waives all objections to the proceedings which do not go to the competency of the tribunal.

Under the Public Health Act (11 & 12 Vict. c. 63), where a disputed claim to compensation is to be settled by arbitration, the award is, by s. 124, to be made "within twenty-one days after the appointment of the arbitrator, or within such extended time, if any, as shall have been duly appointed by him for that purpose." By s. 125 it is provided, that, in case the arbitrators neglect or refuse to appoint an umpire for *seven days* after being requested so to do by any party, the sessions shall, on the application of such party, appoint an umpire. And by s. 126 it is further provided that the time for making an award under the act shall not be extended beyond the period of three months from the date of the submission or *from the day on which the umpire shall have been appointed*, as the case may be.

In 1856, the plaintiff sustained damage from the construction of works by a local board, and in 1858 made a claim for compensation. He afterwards obtained a rule for a mandamus commanding the board to make compensation. Arbitrators were afterwards (in January, 1861) appointed to assess the amount, under s. 123. These having refused to appoint an umpire, the plaintiff applied to the Easter sessions to appoint one, but failed in consequence of the want of a notice of his intention to make such application. The required notice having been given, a second application was made at the Midsummer sessions, and one J. was named as umpire, but, as his consent had not been obtained, no formal appointment was then made. A third application was made at the Michaelmas sessions, and J. was on the 14th of October appointed umpire, and accepted the appointment.

On the 13th of November, the umpire (not having enlarged the time for making his award) appointed the 29th for entering upon the arbitration. The counsel for the board, being informed of this objection, protested against the umpire's going on with the reference, but still attended, cross-examined the plaintiff's witnesses, and called witnesses for the board; and at the close of the business intimated to the umpire that the board would rely upon their protest in case the award should be against them. The umpire made his award in favour of the plaintiff on the 30th of December.

In an action upon the award,—

Held,—1. That the appointment of the umpire in reality took place at the Michaelmas sessions, and was in time, and consequently the award was duly made within three months from the umpire's appointment.

2. That, although the umpire had failed to comply with the requirement of the 124th and 126th sections of the act by enlarging the time for making his award within twenty-one days of his appointment, that defect was cured by the attendance of the board and their taking part in the subsequent proceedings.

3. That the plaintiff was entitled to a mandamus (under the Common Law Procedure Act, 1854), commanding the board to make and levy a rate to satisfy the amount of the award and the costs of the reference, although the six months limited by the 89th section of the Public Health Act for the making of retrospective rates had elapsed since the damage was done,—the action having been commenced within six months after the making of the award, and it not appearing that the plaintiff had been guilty of any laches.

4. That it was no answer to the claim for a mandamus, that by possibility the board might have funds enough in hand to satisfy the demand, without making a fresh rate.

THIS action was brought against the defendant, who is the clerk of the Burslem local board of health, to obtain the sum of 185*l.* 16*s.* as compensation for damage, and 154*l.* for costs, under an award dated the 30th of December, 1861, and also a writ of mandamus commanding the Burslem local board of health to levy a rate in pursuance of the Public Health Act, 1848, for the payment to the plaintiff of the said sums of money.

*The cause came on for trial before Byles, J., at the Stafford Summer Assizes, 1862, when a verdict was taken for the plaintiff, by consent for the sums named in the declaration, subject to a special case.(a) [*174]

(a) The pleadings, which were to form part of the case, consisted of a declaration upon the award, which concluded as follows:—"And for that the plaintiff having become entitled by reason of the premises and by virtue of the said award of the said umpire to have the said moneys paid to him by the said board out of the general or special district rates to be levied under the said act, and a reasonable time having elapsed for the said board to make and levy a rate under the said act for the payment to the plaintiff of the said moneys, and it having become and being the duty of the said board to make and levy a rate according to the provisions of the said act in that behalf for the said moneys so payable by them to the plaintiff, and the plaintiff being personally interested in having the said rate so made and levied as aforesaid, and in being paid the said moneys out of such rate within the meaning of the Common Law Procedure Act, 1854, and the plaintiff, being so interested as aforesaid, duly demanded of and requested the said board to make and levy a rate in pursuance of the said statute for the said moneys so payable to him, and interest thereon, and the costs occasioned him by reason of the non-payment thereof, and to pay him the said moneys, interest, and costs out of such rate when made, levied, and received by them, but the said board have wholly neglected and refused so to do: and the plaintiff claims 300*l.* and a writ of mandamus commanding the said board to make and levy a rate in pursuance of the said act, for the payment to the plaintiff of the said moneys so due and payable to him as aforesaid out of the said rates, and interest and costs as aforesaid, and to proceed with all due diligence to collect and raise the said rates and the said moneys, and to pay him the said moneys and interest and costs out of the said rate when so made, levied, collected, and raised."

The pleas were,—first, that Johnson did not make any such award as alleged,—secondly, that Johnson was not duly appointed umpire as alleged,—thirdly, that Johnson was duly appointed such umpire as aforesaid in the said matters and dispute by the court of general quarter sessions of the peace holden at Stafford, &c., at Midsummer, to wit, on the 1st of July, 1861, on the application of the plaintiff according to the said statute, and that he the said T. Johnson accepted the said appointment, and thereupon ought, pursuant to the said statute, to

*175] *1. In the year 1850, the Public Health Act, 11 & 12 Vict. c. 63, was applied to the town of Burslem, in Staffordshire; and, by virtue of the powers therein contained, the local board of health
 *176] for that town *began to lay down a system of sewers within the precincts of the town, for the drainage thereof.

2. Hans Ringland, the younger, the plaintiff in this action, is the
 *177] owner of four houses in Waterloo Road, *Burslem: and the defendant is the clerk to the Burslem Local Board of Health.

3. In the year 1856, the said houses of the plaintiff were alleged to have been materially damaged by the operations necessary to construct the said sewers; and in 1858 application was made by the plaintiff's attorney to the local board of health for the town of Burslem, through their attorney, for compensation, and a request was also made that they would appoint an arbitrator under the 123d section of the Public Health Act, to whom the matter in dispute might be referred.

4. A rule was subsequently obtained for a mandamus, commanding the board to make compensation; and this rule was made absolute:

have made and published his award within three calendar months from the day on which he was so appointed, to wit, the said 1st day of July, but he wholly failed so to do, and did nothing whatever under the said appointment; and that thereupon, after the expiration of the said three calendar months from the said 1st of July, the said matters and dispute ought to have been again referred to arbitration, pursuant to the provisions of the said act, as if no former reference or appointment of arbitrators or umpire had been made; yet that afterwards, and after the expiration of the said three calendar months, to wit, on the said 14th of October, without any fresh or new reference of the matters and dispute aforesaid being made, or any arbitrator being appointed or reappointed by or on behalf of the plaintiff or the said board, the said T. Johnson was appointed umpire by the said court of quarter sessions as in the declaration mentioned, on the application of the plaintiff, and without the consent and against the will and protest of the said board, which last-mentioned appointment of the said T. Johnson as umpire as aforesaid was and is the appointment in the declaration mentioned; wherefore the defendant said that the said appointment in the declaration mentioned was and is null and void,—fourthly, that the said T. Johnson, having been appointed umpire on the said 14th of October, as in the declaration mentioned, ought, according to the provisions of the said act, within twenty-one days after his said appointment, to have made his said award, or to have extended the time for making the same; yet that he did not within twenty-one days after his said appointment make the said award, or extend the time for making the same, but wholly failed to make the same within twenty-one days after his said appointment, or within any extended time duly appointed by him for that purpose; and so the defendant said that the said T. Johnson did not make his said award within the time required by the said statute in that behalf; and that thereupon the said award is wholly null and void. Issue thereon.

Second replication to the third plea,—that the plaintiff and the said board duly waived all objections to the said second appointment of the said T. Johnson, and consented and agreed to his acting under such second appointment.

Demurrer thereto, the ground of demurrer alleged being, “that the authority of the court of quarter sessions under the statute to appoint an umpire having been duly exercised at one sessions, no waiver or consent would give it authority to re-appoint him at a subsequent sessions.” Joinder.

Second replication to the fourth plea,—that the said T. Johnson duly extended the time for making the said award beyond the said twenty-one days, and duly made his said award within such extended time, and within three months from the day on which he was appointed umpire, according to the statute in such case made. Issue thereon.

Third replication to the fourth plea,—that the plaintiff and the said board duly waived all objections to the said T. Johnson acting as umpire after the expiration of the said twenty-one days, and duly consented and agreed to his acting as umpire up to and at the time when he made his said award, and to his then making his said award.

Demurrer thereto, the ground of demurrer stated in the margin being, “that the authority of the umpire under the statute having expired, no waiver or consent could restore it.” Joinder.

but eventually the *plaintiff, on the 17th of December, 1860, appointed Henry Ward to act as arbitrator under the said [*178 statute on his behalf, and gave the said board notice of the appointment, and required them to appoint another arbitrator on their behalf within the time required by the statute, or otherwise the said Henry Ward would proceed ex parte: and thereupon, on the 2d of January, 1861, the board appointed Richard Stone, of Derby, to act as arbitrator on their behalf.

5. The arbitrators having refused to appoint an umpire, an application was made by the plaintiff, under the 125th section of the Public Health Act, on the 11th of April, 1861, at the Easter sessions, to the court of quarter sessions for the county of Stafford, to appoint an umpire under the said section.

6. The application was resisted by the board on several grounds; and was refused, upon the ground that the plaintiff had not complied with the rules of the court of quarter sessions, by giving seven days' notice to the board of his intention, as required by the practice of that court.

7. The required notice having been given, a second application was made at the Midsummer sessions, on the 3d of July in the same year, to the court of quarter sessions. What took place at those sessions was as follows:—The counsel for the plaintiff moved for the appointment of an umpire. After hearing counsel for the board, who opposed the application, the court decided that they would appoint an umpire; and, after further discussion, Mr. Thomas Johnson, of Lichfield, architect and land surveyor, was fixed upon by the court as such umpire. Mr. Johnson was not present; and neither side was instructed as to whether he would consent to act. It is the duty and practice of the clerk of the peace to make an entry of the acts and proceedings of the court, from which the orders of *the court are subsequently [*179 formally drawn up; and there is no other entry made by the chairman or otherwise of motions or orders of the kind referred to. No order would in the course of practice be formally drawn up unless the assent of the umpire to act had been previously obtained; but the representation of counsel at the sessions would be treated as sufficient for that purpose. On this occasion, Mr. Johnson was not present, and neither side was instructed as to whether he would or would not consent to act. The clerk of the peace advisedly abstained from making any entry of or relating to any nomination or any appointment of an umpire, but, if the assent of Mr. Johnson had been obtained or signified before the end of the sessions (and there was time to communicate with him), the clerk of the peace would have then informed the court of that assent, and made an entry of the appointment of Mr. Johnson, and the order would have been afterwards drawn up and an office copy sent to Mr. Johnson without the further intervention of the parties. No assent having, however, been obtained or signified, no minute or record whatever was made of any appointment or order; and none was drawn up. The clerk of the peace, upon being subsequently applied to as to what had been done in the matter, stated that no order had been made; his view being, that no order was made, the consent of the umpire not having been obtained.

8. At the following quarter sessions, on the 14th of October, 1861,

another application was made to the said court of quarter sessions for the appointment of an umpire. The application was resisted by counsel on behalf of the board, on the ground that a valid appointment of umpire was made at the Midsummer sessions, notwithstanding *180] that no entry was made of it in the books of the court; and that, as the umpire *had failed to make his award within the period of three months from the date of his appointment, the matter referred to him should be again referred to arbitration, as if no former reference had been made, pursuant to the provisions of the statute; and consequently that the proceeding should begin de novo, and new arbitrators be appointed, who might agree upon an umpire; and that, the court having once at the former sessions exercised its authority under the statute to appoint an umpire, it had no jurisdiction or authority to again appoint an umpire in the same matter at a subsequent sessions without the requirements of the statute having been duly complied with. Notwithstanding these objections, the court, after hearing the counsel for the plaintiff, who dissented from the view of the facts taken on the other side, appointed the said Thomas Johnson to be umpire (whose assent had been then obtained); the chairman at the same time saying that the order was made out on the condition of the applicant, namely the plaintiff, taking on himself the responsibility of its validity. The appointment was entered and formally made out by the clerk of the peace in the words following,—

"Staffordshire. At the general quarter sessions of the peace of our Lady the Queen, holden at Stafford, upon Monday, the first week after the 11th of October, to wit, the 14th of October, in the twenty-fifth year of the reign of our Sovereign Lady, Victoria, &c., and in the year of our Lord 1861, before, &c., &c., and others their fellows, justices of our Lady the Queen assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county.

"JOHN WILLIAM PHILLIPS, sheriff.

"In the matter of the claim for damages by Hans *Ringland, the *181] younger, The Local Board of Health of Burslem, and the Public Health Act, 1848.

"Upon the motion of Mr. Mottram, of counsel for Hans Ringland, the younger, upon reading the affidavit of F. C. Lewis, and after hearing Mr. M'Mahon, of counsel for the said local board of health of Burslem. It is ordered that Thomas Johnson, of the city of Lichfield, architect, shall be and he is hereby appointed, under the provisions of the said Public Health Act, 1848, umpire to determine all disputes between the said Hans Ringland, the younger, and the local Board of Health for Burslem, in reference to the amount of compensation (if any) to be paid by the said Hans Ringland, the younger, by the said Burslem local board of health for damage done by the sewerage operations of the said local board of health to four houses belonging to the said Hans Ringland, the younger, situate in Waterloo Road, Burslem, in the said county of Stafford.

"By order of the court,

"R. W. HAND, deputy clerk of the peace.

9. The said Thomas Johnson on the 13th of November appointed the 29th of November the next for entering upon arbitration; and,

upon the meeting for that purpose, the counsel for the Burslem board of health objected to and protested against Mr. Johnson acting as umpire and proceeding with the arbitration, and handed him a written protest setting forth the following grounds of objection:—

“First,—that the appointment of arbitrator on behalf of the said Hans Ringland, the younger, was notified in writing to the board on the 24th of December, 1860, and the appointment of arbitrator on behalf of the board was made on the 2d of January, 1861, and notified to the said Hans Ringland, the younger, *on the 4th of January, [*182 1861: and that the said arbitrators did not make their award, or extend the time for doing so, or appoint an umpire within twenty-one days from the last-mentioned day:

“Second,—that no award was made within three months from the date of the submission or notification as aforesaid, or of the appointment of the arbitrator on behalf of the board, and the notification thereof to the said Hans Ringland:

“Third,—that the first application to the court of quarter sessions for the appointment of an umpire was not made within three months from the notification of the appointment of the said last-mentioned arbitrator, or of the date of the said submission or first-mentioned appointment, or the notification thereof, or before or until the 11th of April last, and that the application was refused:

“Fourth,—that the next application for the appointment of an umpire was made at the quarter sessions held in July last, when an order was made appointing you such umpire; which order was bad, for the reasons before mentioned, and under which you did not make any award for the space of three months or otherwise:

“Fifth,—that, as the last-mentioned order was not proceeded with, it was not competent for the court of quarter sessions to make a subsequent order, and therefore that the order obtained by the said Hans Ringland, the younger, at the quarter sessions held on the 14th of October last, and which you are now proposing to act upon, is bad and void in law, and any proceedings taken thereunder will be void and of no effect: and we shall dispute the legality of such proceedings.”

10. The said Thomas Johnson having then stated that he had not within twenty-one days from the date of his appointment in October extended the time for *making his award, or done anything [*183 whatever under his appointment before the said 13th of November, the counsel for the board further protested on this ground also against his proceeding with the arbitration: and said that, if he did so, the board would take steps to set aside the proceedings, and handed in a second written protest, in the words following:—

“Take notice that the Burslem local board of health also object to your acting as umpire in this matter, and protest against your proceeding with this arbitration, on the ground that you did not make your award or extend the time for making your award under the appointment and order of the court of quarter sessions holden in October last, in manner required by law; and that any proceeding taken by you will be void and of no effect.”

11. The said Thomas Johnson, the umpire, thereupon stated, that, without taking upon himself to determine the validity of the pro-

ceedings, he thought it his duty to proceed with the reference. The counsel for the board then said, that, in that case, he would attend under protest: and he thereupon attended under protest; and, at the close of his case, said he should rely on his protests for setting aside the proceedings as unauthorized, supposing the award were against him. The umpire proceeded with the arbitration; and, after sitting two entire days, and examining the witnesses on both sides, and hearing the addresses of the respective counsel, published his award, dated the 30th of December, 1861, to the following effect:—

"I do hereby find, award, and adjudge that the said local board of health of Burslem do, on or before the 16th of January next, pay to the said Hans Ringland, the younger, the sum of 135*l.* 16*s.* as compensation for the damage which I do hereby award hath been done *184] operations to the said four houses belonging to the said Hans Ringland, the younger, situate in Waterloo Road, Burslem, in the said county of Stafford: And I do hereby further award and adjudge that the said local board of health of Burslem do pay to the said Hans Ringland, the younger, all the costs of and consequent upon the said reference and of this my award."

13. On the 12th of February, 1862, the two several appointments of arbitrators, or submission to arbitration, and the said appointment of umpire, were made a rule of this court.

14. On the 21st of February, 1862, the Burslem local board of health took out a summons to oppose the taxation of costs on the award, on the ground that they should have been ascertained by the umpire, and could not be the subject of taxation by an officer of one of the superior courts. After hearing counsel, Crompton, J., refused to make the order; and the costs were then taxed at 154*l.*

15. The Burslem local board of health still refused to pay the said sum 135*l.* 16*s.* so as aforesaid found due by the award, and the said sum of 154*l.* costs: and this action was then brought to enforce the award.

The questions for the opinion of the court were—first, whether there was any appointment of an umpire at the Midsummer sessions, or whether the proceedings at those sessions deprived the court of the power to make a valid appointment at the October sessions,—secondly, whether, though the umpire did not within twenty-one days after his appointment at the Michaelmas sessions extend the time for making his award, he had afterwards authority to proceed with the reference,—thirdly, whether, if the above objections or any of them to his proceeding with the reference were valid, there was any such waiver of *185] them as gave or restored to him jurisdiction to proceed with the reference,—fourthly, whether the plaintiff is entitled to a mandamus to make a rate, as prayed in the declaration.

Hayes, Serjt. (with whom was *Beasley*), for the plaintiff.—The first question is, whether the appointment of the umpire was made in time. There is nothing in the statute (11 & 12 Vict. c. 63) to require this to be done at the *next* sessions after the parties had referred the matter and the arbitrators neglected or refused to appoint an umpire. The mode of referring to arbitration under this act is regulated by the 123d and three following sections. Section 123 enacts, that, "in case

of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for), and in case of any matter which by this act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, shall appoint an arbitrator, to whom the matter shall be referred; and every such appointment when made on the behalf of the local board of health shall (in the case of a non-corporate district) be under their seal and the hands of any five or more of their number, or under the common seal in case of a corporate district, and, on the behalf of any other party, under his hand, or, if such party be a corporation aggregate, under the common seal thereof; and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same; and, after the making of such appointment, the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation: and if for the *space of fourteen days after any such matter shall have arisen, and notice in writing by one party who has himself duly ap- [*186 pointed an arbitrator to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties: and the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon all persons and to all intents and purposes whatsoever. Section 124 enacts, that, "if before the determination of any matter so referred, any arbitrator die or refuse or become incapable to act, the party by whom such arbitrator was appointed may appoint in writing another person in his stead; and, if he fail so to do for the space of seven days after notice in writing from the other party in that behalf, the remaining arbitrator may proceed *ex parte*; and every arbitrator so appointed shall have the same powers and authorities as were vested in the arbitrator in whose stead the appointment is made; and, in case a single arbitrator die, or become incapable to act, before the making of his award, or fail to make his award *within twenty-one days after his appointment, or within such extended time, if any, as shall have been duly appointed by him for that purpose*, the matters referred to him shall be again referred to arbitration under the provisions of this act, as if no former reference had been made." The 125th section enacts, "that, in case there be more than one arbitrator, the arbitrators shall, before they enter upon the reference, appoint by writing under their hands an umpire, and, if the person appointed to be umpire, die, or become incapable to act, the arbitrators shall forthwith appoint another person in his stead; and, in case *the arbitrators neglect or refuse to appoint an umpire *for seven days* [*187 *after being requested so to do by any party to the arbitration*, the court of general or quarter sessions shall, on the application of such party, appoint an umpire; and the award of the umpire shall be binding, final, and conclusive upon all persons and to all intents and purposes whatsoever; and, in case the arbitrators fail to make their award within twenty-one days after the day on which the last of them was

appointed, or within such extended time, if any, as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; and the provisions of this act with respect to the time for making an award, and with respect to extending to (a) the same in the case of a single arbitrator, shall apply to an umpirage." And the 126th section provides "that the time for making an award under this act shall not be extended beyond the period of *three months from the date of the submission or from the day on which the umpire shall have been appointed*, as the case may be." The first application to the sessions, which was made at Easter, 1861, failed for want of the seven days' notice; the second, which was made at Midsummer, was rendered abortive for want of the consent of the umpire. The appointment made at the Michaelmas sessions, therefore, was clearly in time. The next objection is one of the merest form: it is that the umpire allowed twenty-one days to elapse before he proceeded with the reference, and omitted to enlarge the time. Now, the enlargement of the time for making an award is a voluntary act of the arbitrator or umpire; it needs no consent nor any particular form,—Russell on Awards, 2d edit. p. 142; and it need not even be *188] in writing, unless writing be required *by the submission: and here the statute does not require it. At all events, if this be a valid objection, it was waived, as any mere irregularity may be, by the appearance of the board before the arbitrator, and taking the chance of a decision in their favour: Russell, p. 195. Their continued attendance before the umpire, and calling witnesses, materially enhanced the expense of the proceedings. Appearing to defend, operates a waiver of the want of a notice of trial. [BYLES, J.—In *Holt v. Meddowcroft*, 4 M. & Selw. 467, the plaintiff had obtained a rule for a special jury, which was regularly struck, but a common jury panel was returned together with the special jury panel, and at the trial, none of the special jury attending, it was proposed on the part of the plaintiff to try the cause by a common jury; to which the defendant's counsel objected that this could not regularly be done; but the judge, finding a common jury panel annexed, was of opinion that he ought to try the cause, and accordingly the cause was tried, and there was a verdict for the plaintiff,—*the defendant's counsel appearing and making defence*. On a rule for a new trial, it was contended for the plaintiff that the objection was waived by the defendant's appearance. But Lord Ellenborough said: "What might have been the effect of the defendant's appearing at the trial and making a defence without any protest against trying the issue, it is unnecessary at present to inquire, because we find that the defendant did protest and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because, being, as it were, tied to the stake, and dragged on to trial, he endeavours to make the best of it." Keating, J., referred to *In re Hick*, 8 Taunt. 694 (E. C. L. R. vol. 4). There, by the terms of a reference to arbitration, the two arbitrators were to appoint an umpire before entering *189] into *consideration of the matters in difference, and to make their award before a certain day or such time as they or any

(a) This blunder occurs in *all* the editions of the statutes.

two of them should appoint. The arbitrators, *before appointing an umpire*, enlarged the time, and afterwards held a meeting, at which the parties attended: and it was held, that the parties, being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time having been made before the appointment of the umpire.] In *Tyerman v. Smith*, 6 Ellis & B. 719 (E. C. L. R. vol. 88), on a compulsory reference under the Common Law Procedure Act, 1854, it was held to be no objection to entering up judgment on the award under s. 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference named no time, and no written consent for enlarging the time had been given by the parties,—it appearing that the parties had, within a month before the making of the award, acted upon the reference as still subsisting; such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist. Coleridge, J., there said: "The analogy between this case and *Andrews v. Elliott*, 5 Ellis & B. 502 (E. C. L. R. vol. 85), 6 Ellis & B. 338 (E. C. L. R. vol. 88), is complete. Mr. Bramwell was a judge under the *nisi prius* commission, and could have tried the case with a jury; and the statute [17 & 18 Vict. c. 125, s. 1], under certain limited conditions, gave him power to try by himself,—a power derived, not from his general authority, but from the statute. We and the Court of Exchequer Chamber thought that the plaintiff, by his consent, was estopped from denying that the statutable conditions had been fulfilled. So, here, the master had the power to take a compulsory reference; but he could make his award only within the three months, unless there were a written consent for the *enlargement of the time. Now, the plaintiff's [*190 conduct has been such as to estop him from contending that there was no written consent." And Erle J., concurred. [BYLES, J.—Was there any protest there?] There was not. [BYLES, J.—What is the effect of a protest?] In the matter of *Palmer and The Metropolitan Railway Company*, 31 Law J., Q. B. 259, where a similar question arose upon the 23d section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, Mellor, J., after time taken to consider, said: "There is evidence, I think, that the applicant intended to take advantage of the award if in his favour, and object if it was against him: I think the applicant is estopped by his own conduct from taking advantage of the objection to the want of authority in the umpire; or, if it be not an estoppel, there is, I think, a new parol contract to go on with the arbitration upon the terms of the statutory powers."(a) In *Holdsworth v. Wilson*, 8 Law Times (N. S.) 434, it was held by the Exchequer Chamber (affirming the judgment of the Court of Queen's Bench), that, under the Public Health Act, arbitrators may appoint an umpire after the twenty-one days limited by s. 125 for making their award have expired without their having enlarged the time, provided such appointment be within the time limited by s. 126 for making the umpirage.

(a) In *Lawrence v. Hodgson*, 1 Y. & J. 16, it was held, that an objection that the time for making an award has not been duly enlarged, is waived by proceeding in the reference with a knowledge of that fact.

*191] *Lush*, Q. C. (with whom was *M Mahon*), contra (a)—*This award has not been made within the time prescribed by the statute; and no act has been done by the board, or by those who represented them, which can give it any validity. The umpire having been appointed under s. 125, was bound under s. 124 to make his award "within twenty-one days after his appointment," or within the extended time which he had given himself by a due enlargement. Admitting that parties may consent to an extension of the twenty-one days, though there has been no enlargement, yet, where they have not consented, but on the contrary have expressly dissented, an award made without that formality is a nullity. When they attended before the umpire on the 29th of November, the board did not know whether the time had been enlarged or not. The moment they did learn the fact, they did all they could to express their dissent. Can their formal and reiterated

*192] protest be treated as nothing? Not a single case has been or can be cited where it has been held that a party who attends under protest is bound by the proceedings. [KEATING, J.—Would there have been a consent to the umpire's making an award in favour of the board?] No. The statement made by counsel at the close of the proceedings clearly does not amount to a consent. *Tyerman v. Smith* was a case under the Common Law Procedure Act. The defendant attended without objection, and, after the award was made, he applied to have it set aside on another ground. There was a perfect consent to the jurisdiction throughout. In *Palmer and The Metropolitan Railway Company*, there was no protest, no intimation was given by the parties of their intention to avail themselves of the objection: that, therefore, was a case of express consent to the jurisdiction. And all that *Holdsworth v. Wilson* decides, is, that although the twenty-one days have elapsed, the arbitrators have still enough power left in them to appoint an umpire. It is submitted that the board did not waive their protest by attending before the umpire to protect their interests, and calling witnesses. The case of *Holt v. Meddowcroft*, 4 M. & Selw. 468, was followed by this court in *Lycett v. Tenant*, 4 N. C. 168, 5 Scott 479, 6 Dowl. P. C. 436, where Tindal, C. J., said: "It would be a most dangerous precedent if we were to hold that a defendant, who, dragged to the stake, and protesting against the regularity of the proceeding, answers the attack of his opponent's counsel, is to be deemed thereby to have waived his

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the proceedings at the Midsummer sessions amounted to a valid appointment of umpire, and that consequently the court of quarter sessions could not, unless the parties had begun de novo, make another appointment at the October sessions:

"2. That the umpire, not having made his award, or extended the time for making it, within twenty-one days from the date of his appointment, had no jurisdiction afterwards to proceed with the reference:

"3. That, the appointment of umpire having been made compulsorily under the statute, against the wishes of the local board, there never was in fact any consent to or waiver of the objections to his proceeding with the reference:

"4. That, the umpire having allowed the time for exercising his jurisdiction to expire, no consent or waiver could afterwards give or restore to him jurisdiction:

"5. That a mandamus cannot be granted as prayed, because there is no suggestion that the ordinary remedies are not sufficient, and also because the compensation claimed for the alleged injury to the plaintiff's houses in 1856, and the costs fixed by taxation in February, 1862, are not, nor is either of them, a charge or expense incurred within six months of the making of the proposed rate, pursuant to the Public Health Act, 1848, 11 & 12 Viet. c. 63, s. 39."

objection to the trial." In *Davies v. Price*, 6 Law T. (N. S.) 713, where it was held, that an objection that arbitrators were exceeding their authority in awarding damages, was not waived by the defendant's attending under protest and cross-examining when the question of damages was gone into, Crompton, J., in delivering the judgment of the court, says: "We *are disposed to think, that, as the arbitrators persisted in going into the consideration of damages [*198 after objection taken by the defendant, he did not waive his objection by attending subsequent meetings under protest, no case having been brought to our notice in which a substantial objection has been held to be waived by subsequent attendance before the arbitrator under protest." In the case of *Re Haigh's Estate*, 31 Law J., Chanc. 420, the Court of Chancery referred to arbitration certain matters in dispute between the parties to the suit of *Haigh v. Haigh*, and also between the same parties as to the estate of H., the testator in the cause: those disputes related to certain collieries, their management, and the dealings with them for several years. One of the parties had a son, who was well acquainted with the mining accounts, and had assisted his father in the business, and this party applied to the arbitrator to allow his son to be present; but that officer refused to permit him to be present, on the ground of his behaviour in the matter. A short-hand writer, whose presence the same party wished, to take notes at the meetings, was also excluded. Upon a motion to set aside the award, it was held, that, without going into the question whether the award did or did not do substantial justice between the parties, it must be set aside, the exclusion by the arbitrator of the son and the short-hand writer having been made without adequate ground, and the acquiescence of the party complaining in the proceedings under the reference after their exclusion not being such as to deprive him of his right to have the award set aside.

The award was clearly bad, not having been made within three months after the appointment of the umpire, as required by s. 126. The appointment took place on the 3d of July, at the Midsummer sessions, and the award was not made until the 20th of December. *The party was bound to go to the next sessions, viz. the Easter [*194 sessions, and could not by his blunder give himself an increased period. [BYLES, J.—Where the legislature intend that a thing shall be done at the *next* sessions, it is usually so expressed.] Unless it is held that the application must be made to the next sessions, there is practically no limit at all. [BYLES, J.—It must be done within a reasonable time.] And that must at all events have reference to the period limited by the statute for the making of the award. There is nothing to require the appointment of the umpire by the sessions to be in writing. The case states that "Mr. Thomas Johnson was fixed upon by the court as such umpire." What was that but an appointment? Whose duty was it to obtain Mr. Johnson's assent? It has been held that an appointment of a clerk of the peace by parol is valid. [BYLES, J.—He is not appointed by the sessions.] No: by the lord lieutenant: but it is done in sessions.

Assuming the objections to be untenable, a mandamus under the 68th and subsequent sections of the Common Law Procedure Act, 1854, can only be granted on the same grounds as the prerogative writ of

mandamus by the Court of Queen's Bench. It will not be granted where there is another remedy; and the granting or withholding it is discretionary with the court. Besides, here, the plaintiff comes too late: *Burland v. The Local Board of Health of Kingston-upon-Hull*, 32 Law J., Q. B. 17. The damage was done in 1856; the demand for compensation was made in 1858; and, after having obtained a rule for a mandamus, the plaintiff appointed his arbitrator on the 17th of December, 1860: and this action was not commenced until the 16th of May, 1862. Now, the 89th section of the Public Health Act only authorizes the local board to make and levy rates "prospectively, in *195] order to raise money for the payment *of future charges and expenses, or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time *within six months before the making of the rate.*" [BYLES, J.—The amount was not ascertained here until the making of the award. It was impossible to know beforehand what the award would be.] If a mandamus be directed to issue here, the board would be bound to make and levy a rate, even though they might have funds enough in hand to satisfy the plaintiff's claim; for, nothing but absolute obedience can be returned to the writ.

Hayes, Serjt., in reply, was desired to confine himself to the objection that the umpire had omitted to enlarge the time for making his award within the twenty-one days, to the question of waiver, and to the right to a mandamus. The enlargement not being necessarily in writing or made in any formal manner, it was enough if it was made by parol at any time within three months after the appointment of the umpire; consequently, by giving an appointment on the 13th of November for the parties to come before him on the 29th for the purpose of entering upon the umpirage, the umpire sufficiently complied with the requirements of the statute. There was, therefore, a substantial enlargement within the three months. Then, the conduct of the board was altogether inconsistent with their protest, and clearly a waiver of the objection as to time. *Davies v. Price*, 6 Law T. (N. S.) 713, was a case of excess of jurisdiction. An award may always be set aside where the arbitrator has exceeded his jurisdiction; and an objection on that ground is not waived by attendance before him. This is in the nature of an irregularity, which may always be waived. *196] The board had no right to attend and so *put the plaintiff to expense, and take their chance of cutting down the claim, and then, finding the award adverse, rely upon their protest. As to the mandamus, the case clearly falls within the provisions of the Common Law Procedure Act, and the plaintiff has been guilty of no laches which ought to deprive him of that remedy.

BYLES, J.(a)—I am of opinion that our judgment in this case must be for the plaintiff. The first objection to which our attention has been invited,—but which was not very strongly pressed by Mr. Lush,—was, that an order was made at the Midsummer sessions. If the word "order" is to be understood in the sense of a formal order of the court, or even a memorandum or entry in the book of the clerk of the peace, there was no such thing. If it is to be understood in the sense of a substantial appointment, there was none, because the party nomi-

(a) *Erie, G. J., and Williams, J., were engaged in the Court of Criminal Appeal.*

nated had not intimated his acceptance of the appointment of umpire until the next sessions. Supposing an order could have been drawn up at the Midsummer sessions, what would it have stated? Simply that Mr. Johnson was named umpire, subject to his acceptance of the appointment, and that he had not intimated his acceptance. Clearly, therefore, there was no appointment of an umpire at the Midsummer sessions. Then, the Public Health Act not having limited the application to the *next* sessions, as in the case of appeals against rates, orders of removal, and the like, it seems to me that the party is at liberty to go to any sessions, provided that is done within a reasonable time. Accordingly they come at the next sessions but one, viz. the Michaelmas sessions, and then Mr. Johnson is *formally ap- [*197
pointed umpire, and agrees to act. Unfortunately, however, the sessions at which this appointment took place were held on the 14th of October, and the parties did not go before the umpire until the 29th of November, more than twenty-one days from the date of the appointment, and there does not appear to have been any enlargement. I agree with Mr. Lush that this was an objection to the umpire's proceeding. But, what sort of an objection? Not that the umpire had no jurisdiction over the subject-matter, or that he was an improper person, but that he had not gone through the formal act of saying, "I enlarge the time for making my award,"—which need not be in writing or said in the presence of anybody, but may be said by the umpire in the privacy of his own chamber, and whether he be asleep or awake. But, assuming that to have been a serious and fatal objection, if duly insisted upon, what has been the conduct of the board? Being informed by the umpire that he had not within twenty-one days from the date of his appointment in October extended the time for making his award, they by their counsel protest against his proceeding, but say that they will nevertheless attend, and, if the award should ultimately be against them, would apply to set aside the proceedings as unauthorized. Accordingly they appear, and cross-examine the plaintiff's witnesses, address the umpire, and call witnesses on their own behalf, and then, the award being against them, insist that they are not bound by it, because they appeared and did all this under protest. Cases have been cited in which it has been held, that, where there has been a total absence of jurisdiction, the appearance of the party under protest before the tribunal does not preclude him from afterwards availing himself of the objection. The leading case upon the subject, which has been brought forward upon all occasions *as long as I can remember, is, *Holt v. Meddow-* [*198
croft, 4 M. & Selw. 467. But, what was the nature of the objection there? A proper special jury had been struck, but a common jury panel was returned together with the special jury panel, and at the trial, none of the special jury appearing, it was proposed on the part of the plaintiff to try the case by a common jury. The defendant's counsel objected, and protested against the cause being tried,—the statute relating to the nomination and striking of special juries, 3 G. 2, c. 25, s. 15, expressly saying that "the jury so struck shall be the jury to try the cause;" but the trial was proceeded with notwithstanding, the defendant's counsel appearing and making defence. And, when this fact was urged as an answer to a motion

for a new trial, Lord ELENBOROUGH said that he could not agree that it amounted to a consent on the part of the defendant, because, being, as it were, tied to the stake and dragged on to trial, he endeavoured to make the best of it. The distinction between that case and the present is this,—that, there, the parties were before the wrong tribunal, and here before the right tribunal; there the objection was a substantial one, and here only a shadowy and unsubstantial one. *Lycett v. Tenant*, 4 N. C. 168, 5 Scott 479, 6 Dowl. P. C. 436, was also cited. In that case there was a variance between the writ of trial and the issue: the objection was not to the jurisdiction of the judge to try the cause, but that the plaintiff had brought down the wrong issue to be tried. That, again, was a substantial and fatal objection; and, although the defendant appeared, yet, inasmuch as he did so under protest, he was allowed afterwards to contest the validity of the proceedings. Then, as to *Davies v. Price*, 6 Law T. (N. S.) 713, Crompton, J., in delivering the judgment of the court, certainly *199] does say that they were disposed to think, that, as the *arbitrators persisted in going into the consideration of damages after objection taken by the defendant, he did not waive his objection by attending subsequent meetings under protest. Every word that falls from that very learned judge is entitled to the most respectful attention. But, what was the objection there? The arbitrator had persisted in taking into consideration the question of damages, and thus assumed a power which the submission did not give him. That again, therefore, was a substantial objection. In the case of *Re Haigh's Estate*, 31 Law J., Chanc. 420,—which was a decision of the Lords Justices,—the arbitrator had without sufficient cause excluded from the room the son of one of the parties, and the short-hand writer; and the party affected by this exclusion had nevertheless proceeded with the reference,—whether with or without protest, does not very clearly appear. There the arbitrator had misconducted himself, and consequently there is no analogy between that case and the present. I am of opinion that an objection such as this,—which, after all, amounts to nothing more than the mere omission to pronounce some formal words,—is plainly waived by conduct like that here pursued. I think we should be going against the weight of authority as well as against reason and common sense, if we were to send the parties back to a fresh arbitration on this ground,—more especially in a case where the board seem to have been throwing every possible difficulty in the way of the claimant's obtaining compensation for the damage he has sustained. I make this observation rather with reference to the next point which we have to consider, viz. as to the mandamus.

Now, the granting or withholding of a mandamus under the Common Law Procedure Act, is to a certain extent in our discretion: and the difficulty which has *occurred to me, is, that the delay *200] which took place between the year 1856, when the damage was done to the plaintiff's premises, and the year 1858, when his claim for compensation was first brought forward, has not been very satisfactorily accounted for. In construing the 89th section of the Public Health Act, which limits the power of the board to make rates retrospectively to the raising of money for the payment of charges and expenses which may have been incurred within six months, the word

"incurred" must, I think, be read with reference to the ultimate ascertainment of the amount by arbitration or otherwise; for, it would be impossible to make even an approximate rate, which would, I presume, include the costs of the proceedings, until it was known what the decision was. There is, therefore, no objection to the lapse of time since 1858. And, although the delay between 1856 and 1858 is not so satisfactorily accounted for, yet, when we see what the conduct of the defendants has been in that part of the case which is fully before the court, I cannot help thinking, that, if anything could have been said as to that interval which would have assisted them, it would not have been withheld. As, therefore, we decide on all the other points in favour of the plaintiff, I think we are bound to give him the full remedy which the law allows, by directing that a writ of mandamus do issue.

KEATING, J.—I entirely agree with the judgment pronounced by my Brother Byles, and in the reasons which he has given. The distinction which he has pointed out between the cases relied upon and this case, seems to me to be the valid distinction upon the only question which might have presented some difficulty, viz. as to how far the attendance of the parties before the umpire operated a waiver of the objection *(which I think was a valid one) that the umpire had [*201 omitted to enlarge the time for making his award within the twenty-one days prescribed for that purpose by the statute. That distinction runs through all the cases, and will be found on examination to reconcile them all. Wherever it has been held that the continued attendance before the arbitrator waived an objection of which the party was cognisant, it will be found that the objection was to the competency of the tribunal; and that is an objection which cannot be so waived. None of the cases, however, as to arbitrations, struck me with much force except that of *Davies v. Price*, 6 Law Times (N. S.) 713. But that case, when carefully looked at, will be found rather to be an authority in favour of our present decision. Crompton, J., says that the court are disposed to think, that, as the arbitrators persisted in going into the consideration of the damages after objection taken by the defendant, he did not waive his objection by attending subsequent meetings under protest,—no case having been brought to their notice in which a substantial objection had been held to be waived by subsequent attendance before the arbitrator under protest. The objection there was, that the arbitrators were assuming a jurisdiction over matters which the parties had not submitted to them; and this the court held to be a substantial objection. The judgment of the court, however, did not proceed even upon that, but upon this,—that the declaration was upon the express submission of the parties, and not upon an implied submission arising from the acts and conduct of either of them in the course of the reference, and consequently the evidence of acquiescence was irrelevant and inapplicable. In truth, it was an attempt to alter the nature and extent of the submission by the conduct of one of the parties to it. I must say I should have been surprised if any case could have been cited to *sustain [*202 such an objection as this. It seems to me to be a contradiction in terms, to say that, having protested against the umpire's right to proceed, the party protesting may, nevertheless, not only attend and watch the proceedings, but cross-examine his adversary's witnesses,

and call witnesses on his own part, and then say to the arbitrator,—“If you decide in my favour, I am content; but, if you decide against me, I will stand upon my protest, and move to set aside your award.” I entirely agree with my Brother Byles, that that objection cannot be sustained, and that the plaintiff is entitled to our judgment.

That being so, then arises the question as to the mandamus to compel the board to make and levy a rate to satisfy the plaintiff's claim. Notwithstanding the ingenious argument of Mr. Lush, that the board may be so well provided with funds that a rate may be unnecessary, it is highly probable that the only remedy that will be available to the plaintiff is the granting the writ. If the board choose to satisfy the claim without proceeding to make a rate, we might possibly be disposed to accept that as a compliance with the mandamus.

With regard to the effect of the 89th section of the Public Health Act, which was relied upon by Mr. Lush as a bar,—the six months limited by that act for the making of a retrospective rate having elapsed since the time when the injury complained of was sustained,—it seems to me that the time we are to look to, is, the time of making the award and the bringing of the action. Until the award was made, the amount was not ascertained.

For these reasons, as well as for the reasons given by my Brother Byles, I think the plaintiff is entitled to judgment and to a writ of mandamus as prayed.

Judgment for the plaintiff.

*203] ***SIR MOSES MONTEFIORE, Bart., Chairman of the Alliance British and Foreign Life and Fire Assurance Company, v. ISAAC LLOYD. Nov. 10.**

The defendant executed a bond as surety to an insurance company for the fidelity of A., who was appointed an agent of the company at Adelaide, and who was about to and afterwards did enter into partnership (as merchants) with B., also an agent of the company at that place. The condition of the bond was, that, if A., his heirs, executors, &c., should well and truly pay and account for all moneys received by him, the obligation should be void:—Held, that the defendant was not responsible under this bond for moneys received by the firm of A. & B., notwithstanding he was aware at the time he signed the bond that A. was about to become partner with B.

Held, also, that the surrounding or “co-existing” circumstances were admissible for the purpose of explaining what might be ambiguous in the condition.

THIS was an action brought by the plaintiff as chairman of the Alliance British and Foreign Life and Fire Assurance Company,—a company incorporated under an act of 5 G. 4, c. cxxxvii.,—against the defendant upon a bond given by him to the company for 500*l.* under the circumstances hereinafter set forth. Under a judge's order made by consent, the following case was stated for the opinion of the court without pleadings:—

1. In the year 1854, George Henry Fox, who resided and carried on business at Adelaide, in Australia, was the agent of the Alliance company at Adelaide; and by a letter, dated from Adelaide the 27th of November, 1854, the directors of the company were informed of his desire that John Sanderson Lloyd should be associated with him in the agency of the said company at Adelaide. The following is a copy

of that part of the letter addressed to the secretary of the company in which such desire is expressed:—

"I have now to request you will be good enough to intimate to the directors my desire that the name of Mr. John Sanderson Lloyd should be associated with mine in the power of attorney for the conduct of this agency, as I am about taking that gentleman into partnership. I may observe that Mr. Lloyd has been in my counting-house for some time, and is nephew to Mr. J. S., one of the partners of the firm of S. & Co., and you could apply to that gentleman as a referee, in case *of need. My more particular object in writing this, is, that I contemplate visiting England next year; and it is [*204 important that the interests of the company should not suffer during my absence. You will be furnished with the necessary security for Mr. Lloyd. I should also further mention that Mr. Lloyd has had for some time the management of this branch of business in our counting-house; and I consider him in every way fully qualified to manage efficiently the agency of the company."

2. On the 14th of February, 1855, a resolution was passed at a meeting of the board of directors of the company, as follows:—"That Mr. John Sanderson Lloyd, of Adelaide, be associated with Mr. G. H. Fox in the management of the agency there, as suggested in a communication from the latter gentleman dated the 27th of November last, and that he be required to furnish security to the extent of 500*l*."

3. On the 1st of March, 1855, F. A. Englebach, on behalf of the company, wrote to Fox a letter of which the material portion is as follows:—

"I am happy to inform you, that, in accordance with your request, the directors have associated Mr. J. S. Lloyd with you in the control of the Adelaide agency; and a new power of attorney will consequently be prepared, and forwarded by the next mail. It will be necessary that Mr. Lloyd execute a bond for 500*l*., to which Mr. Theodore Lloyd, of the Stock Exchange, and Mr. Isaac Lloyd, of Bristol, have undertaken to become sureties."

4. The J. S. mentioned in the extract of the letter of the 27th of November, 1854, declined to become one of the sureties for J. S. Lloyd, but wrote on the 7th February, 1855, a letter to the defendant, who is the father of J. S. Lloyd, as follows:—

"Dear Isaac,—I send you on the other side an *extract of a [*205 letter from G. H. Fox to the Alliance company, whose agency we were the means of obtaining for him. It will be necessary, if J. S. Lloyd be associated with him in the agency, that a bond signed by two parties for 500*l*. be entered into. As it is only insuring his integrity, it is a nominal thing: but I cannot be one, on account of my articles of partnership, which expressly prohibit any one of the partners from becoming surety. I should think J. S. Thomas might not have the same objection; and your own name would do for one. I enclose a form."

5. The extract alluded to in the last-mentioned letter was an exact copy of the extract set out in the first paragraph of this case. The said letter, with the aforesaid extract on the other side of it, was received by the defendant shortly after its date; and he as well as

one Theodore Lloyd consented to become sureties for John Sanderson Lloyd.

6. On the 14th of March, 1855, the defendants duly executed and delivered to the company the bond on which this action is brought, which bond was as follows:—

"Know all men by these presents, that we John Sanderson Lloyd, of Adelaide, in the colony of South Australia, merchant, Theodore Lloyd, of the Stock Exchange, London, gentleman, and Isaac Lloyd, of Bristol, in the county of Somerset, gentleman, are jointly and severally held and firmly bound to the Alliance British and Foreign Life and Fire Assurance Company in the penal sum of 500*l.* of good and lawful money of Great Britain, to be paid to the said Alliance British and Foreign Life and Fire Assurance Company, their successors or assigns, for which payment to be well and faithfully made we bind ourselves, and each of us our and each of our heirs, executors, *206] and administrators, *jointly and severally, firmly by these presents, sealed with our seals. Dated the 14th day of March, 1855 :

"Whereas, the above-bounden John S. Lloyd hath been nominated and appointed by the board of directors of the Alliance British and Foreign Life and Fire Assurance Company to be an agent(*a*) of the said company at Adelaide, and on such his nomination it was stipulated by or on behalf of the said company and agreed to by the said John S. Lloyd, that he, together with the above-bounden Theodore Lloyd and Isaac Lloyd, should enter into the above-written bond or obligation for securing the fidelity of the said John S. Lloyd :

"Now, the condition of the above-written bond or obligation is such, that, if the said John S. Lloyd, his heirs, executors, or administrators, or some or one of them, shall and do from time to time and at all times hereafter when and so often as he or they shall be thereunto required by the actuary, secretary, or other officer of the said company, well and truly pay or cause to be paid unto the directors of the said company, some or one of them, or to such person or persons as they or he shall order, direct, or appoint, all such sum and sums of money as shall be *by the said John S. Lloyd* had and received as or by way of premiums for assurances effected with the said company, or otherwise howsoever on account and for the use and benefit of the said company, or with which *he* shall be intrusted by or on account of the said company; and also shall and do from time to time and at all times hereafter when and so often as he or they shall be thereunto required by the said actuary, secretary, or other officer, render to the *207] said *directors, some or one of them, a true, just, and perfect account of all and every sum and sums of money that shall be *by him* had and received, or paid, laid out, and expended for or on account of the said company; and also shall and do well, truly, justly, and honestly in every respect behave and conduct *himself* in his said office or employment of agent to the said company,—then the above-written bond or obligation is to be void, otherwise to be and remain in full force and virtue."

(*a*) It was stated in the case, that the word "an" was, before the execution of the bond, written over the word "the" which last-mentioned word was part of a printed form, and had been previously struck out.

The bond was also duly executed by John Sanderson Lloyd and by Theodore Lloyd.

7. On the 3d of April, 1855, J. W. Collins, on behalf of the company, wrote a letter to Fox, of which the material part is as follows:—

“I now beg to forward a power of attorney constituting John S. Lloyd, Esq., an agent of the company, and also enclose a bond for his signature, which, as he will perceive, has already been executed by the sureties to whom I referred in my last.”

The power of attorney referred to in the last-mentioned letter was duly executed on the 28th of March, 1855, by the president and directors of the company, who thereby ordained, nominated, constituted, authorized, empowered, and appointed Jonathan Binns Were, George Henry Fox, and John Sanderson Lloyd, all of Adelaide, in the colony of South Australia, merchants, *jointly, and each or either of them separately*, the true and lawful attorneys and attorneys of the said company to assure buildings, goods, and other property in Adelaide and elsewhere against loss or damage by fire, subject to certain conditions not material to this case.

8. The said Jonathan Binns Were mentioned in the aforesaid power of attorney, had been since 1851 appointed by the president and directors of the said company an agent of the said company, and had been *authorized and empowered by them by power of attorney, either jointly with the said G. H. Fox or separately, to [*208 insure goods, buildings, and other property in Adelaide and elsewhere against loss or damage by fire, subject to the same conditions as mentioned in the aforesaid power of attorney of the 28th of March, 1855; but since February, 1852, the said Jonathan Binns Were resided at Melbourne, and entirely ceased to act as agent for the company, though the power of attorney was not actually taken away from him.

9. In June, 1855, the said John Sanderson Lloyd entered into partnership with Fox at Adelaide; and they there carried on business under the name, style, and firm of G. H. Fox & Co. until the said firm failed, as hereinafter mentioned.

10. On the 19th of December, 1855, the president and directors of the company duly executed a power of attorney by which they nominated, appointed, and authorized the said G. H. Fox and John S. Lloyd, both of Adelaide, in the colony of South Australia, merchants, trading under the firm of G. H. Fox & Co., *jointly, and each and either of them separately*, to be the agents of the said company to assure buildings, goods, and other property in Adelaide and elsewhere against loss or damage by fire, subject to certain conditions which are not material to the present case.

11. In February, 1859, the aforesaid firm of G. H. Fox & Co., which said firm consisted as aforesaid of the said George Henry Fox and the said John S. Lloyd, failed, and was adjudicated insolvent in the court of insolvency in South Australia; and the estate of the said firm was wound up and administered in the said court.

12. At the time of its failure, the aforesaid firm of G. H. Fox & Co. was indebted to the company in the sum of 450*l.* 11*s.* for premiums received by the said *George Henry Fox and John S. Lloyd as [*209 agents for the said company since the date of the afore-

mentioned bond. Of this sum 338*l.* 18*s.* 2*d.* was due in respect of premiums received for fire-insurance, and 111*l.* 12*s.* 10*d.* was due in respect of premiums received for life-insurance. The said company proved for the sum of 450*l.* 11*s.* on the joint estate of the said firm in the said court of insolvency, and received thereon a dividend at the rate of 5*s.* 3*d.* in the pound, amounting to 118*l.* 5*s.* 5*d.*; and the company have not received any other sum of money in respect of the aforesaid sum of 450*l.* 11*s.*

13. The defendant objects to the admissibility in evidence of the documents and matters referred to and stated in the second, third, fourth, and fifth paragraphs of the above case.

The question for the opinion of the court was,—whether the defendant was liable on the aforesaid bond to the said company in respect to the unpaid portions of the said sums of 338*l.* 18*s.* 2*d.* and 111*l.* 12*s.* 10*d.* or either of them, or any part thereof.

The court was to be at liberty to draw any inferences from such of the above facts as were admissible in evidence which a jury might have drawn.

If the court should be of opinion in the affirmative in respect to the unpaid portions of both the said sums, then judgment was to be entered up for the plaintiff for 332*l.* 5*s.* 7*d.* and costs of suit.

If the court should be of opinion in the affirmative as to the unpaid portion of the said sum of 338*l.* 18*s.* 2*d.*, and in the negative as to the unpaid portion of the said sum of 111*l.* 12*s.* 10*d.*, then judgment was to be entered up for the plaintiff for 249*l.* 18*s.* 11*d.*, with costs of suit.

If the court should be of opinion in the affirmative as to the unpaid *210] portion of the said sum of 111*l.* 12*s.* 10*d.*, and in the negative as to the unpaid portion of the said sum of 338*l.* 18*s.* 2*d.*, then judgment was to be entered up for the plaintiff for 82*l.* 6*s.* 9*d.*, with costs of suit.

If the court should be of opinion in the negative in respect to the unpaid portion of both the said sums, then judgment of nolle prosequi, with costs of defence, was to be entered up for the defendant.

Lush, Q. C. (with whom was *Cohen*), for the plaintiff(s)—The circumstances under which the defendant consented to enter into the suretyship are clearly admissible in evidence as against him. No doubt, any act done by the creditor which has the effect of altering the position or increasing the risk of the surety, without his consent, discharges him. But here nothing was done which was not known and contemplated by all the parties at the time the defendant executed the bond. The principal obligor having under the circumstances disclosed by the case entered into partnership with a third person, can the surety escape responsibility by saying that the moneys received by the firm were not received by his principal? If an agent employs a clerk, a receipt of money by such clerk is a receipt by the agent.

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the bond sued on renders the defendant liable in respect of moneys received by him as agent for the company, though he may have received them jointly with Fox:

"2. That the words 'an agent,' which said words are in the aforesaid bond, may be explained by showing what was known to and intended by the parties:

"3. That nothing happened since the execution of the bond to discharge the defendant from his liability as surety."

If, instead of employing a clerk, he takes a partner, and the partner receives money, why is not that equally a receipt by him? Some *cases which may be relied upon on the other side are clearly distinguishable. The first in order of time is *Bellairs v. Ebsworth*, 3 Campb. 53. It was there held, that if A. become bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards, with B.'s knowledge, takes D. as his partner, the guarantee does not extend to sums of money received by C. for B.'s use after the formation of the partnership. And Lord Ellenborough said: "The defendant was surety for Philip Nott, and not for Mingay, Nott & Co. When the plaintiffs intrusted their agency to the new firm, the defendant's responsibility was at an end. He by no means undertook for the good conduct of any future partner with whom P. Nott might associate. The recital and the whole scope of the condition show that the suretyship was confined to P. Nott individually." There, the partnership was a new act not contemplated by the surety at the time of entering into the bond, and the creditors had made a new appointment of the firm instead of the individual, whereby they increased the liability of the agent. The case may well be sustained upon that ground. Similar in principle is the case of *Moon v. The Alderbury Union*, 3 Exch. 590. There, the plaintiff was a co-surety with K. in a bond given by B. to the guardians of a union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into, B. was a member of a banking firm into which the moneys of the union were afterwards paid and drawn out by the guardians by checks in their own name. The firm became bankrupts, and B. having ceased to be treasurer, the guardians demanded of the plaintiff as such surety the balance due from B. the late treasurer. The plaintiff, in ignorance of the facts, paid the money: and it was held that the sureties were not *liable on the bond, and that the plaintiff, having paid the money in ignorance of the facts, was entitled to recover it back. Parke, B., in delivering judgment, there says: "For moneys so paid to two or more partners, the surety for one is not responsible, according to the cases cited, of *Bellairs v. Ebsworth*, and *The London Assurance from Fire v. Bold*, 6 Q. B. 514 (E. C. L. R. vol. 33). Those cases show, that, if a person is surety for another for the due accounting for moneys received by him, the receipt of the moneys by that person and his partner is not the same as the receipt by him alone, because the surety may be willing to be accountable for one individual, but not for him and his partner; and a payment to one partner is a payment to both." There, the position of the surety was, without his knowledge, altered by the act of the creditors. That case, therefore, like *Bellairs v. Ebsworth*, was essentially different in its circumstances from the present case. The *London Assurance from Fire v. Bold*, it is submitted, was not well decided. There, the condition of a bond given by the defendant to the plaintiff, after reciting that A. had been appointed agent for the plaintiff, which employment he had accepted, and undertaken to perform the trusts thereof, was declared to be, that, if A. should, during his continuance in such employment, faithfully demean and conduct himself, and, when required, account for and pay to the plaintiff all moneys which

he had received or should thereafter receive for the plaintiff's use, the bond should be void. A declaration on the bond set out the condition, and averred, that, while A. remained in the employment of the plaintiff as agent as aforesaid, A. received for the use of the plaintiff moneys amounting, &c., but did not when required account, &c.: plea, that A. did not, while he remained in the service of the plaintiff, as *213] such agent as in the declaration mentioned, receive for *the use of the plaintiff the sums mentioned. The Court of Queen's Bench held that the plaintiff did not support the issue by proof that A. and B., as partners, were employed by the plaintiff as agents, and in that character had jointly received money for the plaintiff's use,—it appearing that A. had never been employed by the plaintiff or received money for him solely: and that no difference would be made by proof that the defendant knew that A. was to be employed only as partner with B. "When a party," says Lord Denman, "makes himself surety for the conduct, not of A. and B., but of A., the stronger proof you give that he knew the relation in which A. and B. stood to each other, the stronger you make the inference arising from his mentioning only A. Suppose the condition recited that the two were joint agents, and then spoke only of the conduct of one, would not that be a strong proof that the suretyship was intended to apply only to the separate acts of that one? Mr. Kelly's comment upon *Bellairs v. Ebsworth* is very ingenious; but the case is quite against him." The court, therefore, assume that *Bellairs v. Ebsworth* governed the case before them; whereas the facts show that the two cases are essentially different.

Montague Smith, Q. C. (with whom was *H. T. Cole*), contra(a)—The defendant by this bond only became responsible for the acts of John *214] S. Lloyd, not for those *of the firm of Fox & Co. The intention of the parties to the bond is only to be collected from the instrument itself: no extrinsic evidence is admissible to vary or explain it. There is no ambiguity: the recital is, that John S. Lloyd has been appointed an agent of the company; and the condition is for the due accounting by him of all moneys which shall be received by him on account of the company. The firm received the money; and the company proved for the amount against their estate. Even if extrinsic evidence could be admitted, the case is governed by *The London Assurance from Fire v. Bold*, 6 Q. B. 514 (E. C. L. R. vol. 33). The court is, in effect, called upon to overrule that case. *Wightman*, J., there says,—“The recital is the proper key to the meaning of the condition.” And after referring to *Hassell v. Long*, 2 M. & Selw. 363, he adds: “Here the recital does not contain a word referring to any agency but that of Addison. Then Mr. Kelly raises the question whether the receipt by Addison & Boulton is a receipt by Addison. On ordinary principles, each party is liable for receipts by either. But the question here is, not to what extent the one can make the other

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the defendant is not liable under the bond for moneys received by John Sanderson Lloyd under the facts stated in the case:

“2. That he is not liable in respect of moneys received by John Sanderson Lloyd jointly with Fox under a joint appointment:

“3. That the parol evidence referred to in the case is not admissible to add to, contradict, or explain the terms of the bond.”

liable to the employer, but whether the defendant became surety for the acts of both."

Lush, in reply.—Omitting the fact of the knowledge of the surety that the partnership existed at the time of signing the bond, the case of *The London Assurance v. Bold* is not adverse to the present plaintiff. At the time the defendant executed this bond, he knew his son's intention. The fact of the contemplated partnership was communicated to him by means of the extract from Fox's letter of the 27th of November. The bond may have two meanings, according to the surrounding circumstances. *Primâ facie*, it would mean moneys which came to the hands of John S. *Lloyd as agent. But, if it was [*215] known at the time that he was going to become the partner of Fox, it may well mean moneys which came to the hands of the firm. It is only by looking at the surrounding circumstances that the meaning and understanding of the parties can be ascertained. There is in reality no case which, fairly considered, can be said to militate against the plaintiff's right to recover.

ERLE, C. J.—I am of opinion that our judgment in this case must be for the defendant. If the surrounding circumstances had shown that the bond could have no operation unless the construction sought to be put upon it by the plaintiff were the true one, I am clear that those surrounding circumstances ought to be taken into account. But I think the words of the bond are stronger according to the defendant's construction. The defendant's undertaking amounts to this,—“I undertake to be surety for the integrity of John Sanderson Lloyd, and am willing to be answerable for any moneys of the company which may come to *his* hands.” The contention on the part of the plaintiff is, that the defendant not only undertook to be responsible for moneys received by John Sanderson Lloyd individually, but for partnership receipts also,—for moneys of the company which might come to the hands of Fox & Co. The words of the bond, however, are not so. Let us, then, look at the surrounding circumstances. The defendant's suretyship originated in a proposal that John Sanderson Lloyd should enter into partnership with Fox,—a general partnership, not for the receipts of these premiums only. Fox and Lloyd might very well have become partners as merchants, and yet each of them might have been a separate agent for an insurance company. The first letter set out in the case discloses the fact of Fox's *in- [*216] tention to come to England; and hence his desire to have some one associated with him in the agency. It is clear, that, during the time that Fox might be in England, though Lloyd might individually receive premiums on policies effected by him, he still would receive them on the partnership account. At the date of the bond,—March 14th, 1855,—there was no existing partnership. And the letter of the 7th of February, praying the defendant to take upon himself the responsibility, assures him that he will only be answerable for the integrity of his son; whereas, the construction now sought to be put upon the bond by the plaintiff, is, that he was becoming answerable for the integrity as well as the solvency of Fox also. It is said that if John Sanderson Lloyd had been the sole agent, and he had employed a clerk to assist him in transacting the insurance business, the bond would have covered receipts by such clerk. To that I assent. But

the authority of a partner is much more extensive than that of a clerk or servant. Then, the powers of attorney set out in the case are all joint and several, and are equally consistent with a receipt of moneys by the two as with a receipt by each as a separate agent for the company. Upon the whole, I feel constrained to come to the conclusion that the defendant is entitled to the judgment of the court.

WILLIAMS, J.—I am of the same opinion: though, at the same time I think it right to say that I do not think the authorities, commencing with *Bellairs v. Ebsworth*, and ending with *The London Assurance Company v. Bold*, constrain us,—construing this bond by the light of the surrounding circumstances,—to say that the defendant's engagement might not be extended to make him answerable for moneys received by John Sanderson Lloyd in conjunction with a *217] partner. But the question *is, whether the surrounding circumstances here do lead to the conclusion that that was the intention of the parties. If such were their intention, I think there is nothing in the language employed to preclude the court from giving effect to that intention: because, though *prima facie* a receipt by A. means by him alone, it may yet appear that a more extensive meaning was in the contemplation of the parties. The question remains, whether there is sufficient evidence in the surrounding circumstances to lead us with reasonable certainty to the conclusion that a more extensive meaning was contemplated. I think,—though at first I was inclined to think otherwise,—there is no evidence of that. The letter of the 7th of February, in which was forwarded to the defendant an extract from the letter from Fox of the 27th of November, set out in the first paragraph of the case, informs the defendant that "it will be necessary, if John Sanderson Lloyd be associated with him (Fox) in the agency, that a bond signed by two parties for 500*l.* be entered into:" and the letter goes on to say,—“As it is only insuring *his* (that is, John Sanderson Lloyd's) integrity, it is a nominal thing.” That letter clearly indicates that the son is to be associated with Fox in the agency, and holds out to the defendant that he incurs no responsibility provided *his son* acts with integrity in the business. I think the reference to the intended partnership justly leads to no further inference than this, that Fox and John Sanderson Lloyd were to be associated together as partners in the agency, but not that the surety for the latter was to be responsible also for the acts of Fox. I desire not to express myself more strongly than is necessary for the decision of this case upon the facts as stated.

BYLES, J.—I am of the same opinion. I was for some time strongly *218] impressed with the notion that our judgment *ought to be for the plaintiff: but the argument has induced me to alter my opinion. I rely chiefly upon the words of the bond. It is true that a bond or other instrument under seal cannot be varied by an instrument not under seal. The question is, what is the meaning of this bond, regard being had to the surrounding circumstances? At the time the bond was sealed, no partnership existed between Fox and John Sanderson Lloyd. The bond is dated the 14th of March, 1855, and the partnership commenced in June. Now, the surrounding circumstances are the co-existing circumstances. What says the bond? It recites that “the above-bonded John Sanderson Lloyd hath been nominated and appointed by the board

of directors of the company to be an agent of the company at Adelaide,"—referring, therefore, to a still prior time,—“and on such his nomination it was stipulated by or on behalf of the company, and agreed to by the said John Sanderson Lloyd, that he, together with the above-bounden Theodore Lloyd and Isaac Lloyd, should enter into the above-written bond or obligation *for securing the fidelity of the said John Sanderson Lloyd.*” Then the condition is, that, “if the said John Sanderson Lloyd, his heirs, executors, or administrators, or some or one of them,”—and these are most important words,—“shall well and truly pay or cause to be paid unto the directors of the company all such moneys as shall be *by the said John Sanderson Lloyd* received as or by way of premiums on account of the company, or with which *he* shall be intrusted by or on account of the company, and shall when required render true accounts of all moneys *by him* received, &c., and shall justly and honestly conduct *himself* in his employment of agent to the company, the obligation was to be void.” Looking at the co-existing facts, can we reasonably put any other construction upon this bond than that the principal debtor, the agent, was to be liable for his own *acts and defaults only, and that the sureties were to be liable for the acts and defaults of the principal, and of the heirs, executors, or administrators of that principal? Even if we look at the letter of the 7th of February,—which I do not think would be at all material,—all it says, is, that the proposed bond is only for insuring the integrity of John Sanderson Lloyd. So far from that letter leading to the inference that the sureties are to be responsible for the acts or defaults of the firm, it seems to me that it ought to lead to the opposite conclusion. The consequence of joining others with the principal debtor, would be to deprive the sureties, in case of the principal debtor's predeceasing those persons, of the security which the law gives them; for, I take the law of partnership to be, that personal chattels of a partnership do not survive to the representatives of a deceased partner, but that all choses in action and all contracts entered into by the firm pass to the survivors, and the co-contractor's executors are altogether relieved therefrom. Besides which, although Fox and John Sanderson Lloyd were partners, yet, by the authority under which they acted, they were separate as well as joint attorneys. What was to prevent the company from saying, that, as between them and their attorneys, the accounts should be kept separately, though, as between the attorneys themselves, as partners, they might be blended? I feel convinced that the more the matter is considered, the more reason there will be found to be why our judgment should be for the defendant. I do not at all rely upon what has sometimes been said, viz. that a surety is the favourite of the court. And I will merely add that the three cases of *Bellairs v. Ebsworth*, *The London Assurance Company v. Bold*, and *Moon v. The Alderbury Union*, are all strongly in favour of the defendant: and, though there is nothing in the report of the case of *The London Assurance Company v. Bold* to justify the *conclusion that the knowledge of the intended partnership was brought home to the defendant, still, both the Lord Chief Justice and Mr. Justice Wightman assume that to be the fact in their judgments.

KEATING, J.—I am of the same opinion, though, like the rest of
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the court, my mind has fluctuated somewhat in the course of the argument. I have, however, arrived at the conclusion that the defendant is entitled to judgment. The words of the bond, taken by themselves, are clear enough. But Mr. Lush has relied upon the extrinsic evidence to show that those words may admit of a construction different from that which *prima facie* they would seem to import. If the extrinsic evidence had shown (as I at one time felt inclined to think it did) that the bond could have no operation at all unless the construction contended for by the plaintiff were put upon it, I should have hesitated before I decided against him. But that difficulty has been entirely removed by the argument of Mr. Smith. He has shown satisfactorily that the bond might have an operation without going to the extent contended for on the part of the plaintiff. It is unnecessary to repeat what has already been better said by my Lord and my two learned Brothers: and I will only add that the impression produced upon my mind from a consideration of the extrinsic evidence, is, that, although the defendant had a knowledge which might reasonably have led to the inference that he did contemplate becoming responsible for the acts of the two partners, yet he did in truth contemplate only that he was becoming responsible for the integrity of his own son. For these reasons, I come without hesitation to the conclusion that our judgment ought to be for the defendant.

Judgment for the defendant.

*221] *JANE ROBBINS, Administratrix of EDWIN JAMES
ROBBINS, deceased, v. JONES. Nov. 16.

If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way,—as, a flight of steps, or a projecting flap,—no action can be maintained against the person dedicating it for an injury caused thereby.

Nor will an action lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication of the highway, and was dedicated to the public before the last General Highway Act, for an injury to an individual from the giving way of the covering of the area in consequence of the wear and tear occasioned by public user.

In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses and this road was a space which was covered over (as a means of access to the houses) by a flagging in which were gratings to let light and air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level at the rear. The space so covered had become, by dedication prior to the General Highway Act, 5 & 6 W. 4, c. 50, a part of the public footway, and was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging and grating in front of one of the houses (having become weakened by user) gave way, and several persons were precipitated into the area below (a depth of about thirty feet), and one of them was killed:—Held,—in an action by the widow of the deceased, under Lord Campbell's Act, 9 & 10 Vict. c. 93,—that, there being under the circumstances no legal liability on the part of the lessee of the houses to keep the surface of this way in repair, the action was not maintainable,—the gulph at the side of the causeway being the result of the road being raised by the makers of it, not by the land at the side being excavated by the proprietors of it: and that the artificial character of the flagging and grating did not make it more or less a way to be repaired by the parish.

A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening in consequence during the term.

THIS was an action brought by the plaintiff, as administratrix of

her deceased husband, to recover damages under Lord Campbell's Act, 9 & 10 Vict. 93, for an accident resulting in his death through the alleged negligent and improper conduct of the defendant, in wrongfully permitting a certain area adjoining and under a certain public footway, the property of the defendant, to be and continue in a dangerous and unsafe condition.

The declaration stated that the defendant was owner and possessed of certain houses and premises and a certain area in front of and parcel of the same immediately adjoining and under a certain common and public footway, and the said area was covered and protected with and by an iron grating, and it was then the duty of the defendant at all times to keep and maintain the said area and grating in good and sufficient repair, so that persons passing over and along the *said footway might not be in danger of falling into the said area; [*222 yet that the defendant wrongfully permitted the same to be and continue, and the same were and continued, in a dilapidated, decayed, dangerous, and unsafe state and condition, to the danger of persons lawfully passing over and along the said common and public footway; and the defendant, well knowing the premises, demised and let his said houses and buildings and the said area and grating in the same state and condition to certain other persons, to wit, Smith Allen Jeffs and Augustus Jeffs, and wrongfully suffered and permitted the said area and grating to be and continue, and kept and maintained, and continued kept and maintained the same in the same state and condition, until the happening of the grievance thereafter mentioned: And the said Edwin James Robbins, deceased, afterwards, to wit, on the 10th of February, 1862, was lawfully passing over and along the said common and public footway, as he lawfully and properly might, and by reason of the said dilapidated, decayed, dangerous, and unsafe state and condition of the said area and grating, the same fell in, and the said Edwin James Robbins was thrown down into the said area, whereby he was severely hurt and injured, and by reason of the said injuries thereby occasioned to him as aforesaid the said Edwin James Robbins afterwards, and within twelve calendar months next before the bringing of this suit, died: and the plaintiff, as administratrix as aforesaid, for the benefit of her the said widow and Louise Jane Robbins the child of the said Edwin James Robbins, deceased, according to the form of the statute in that case made and provided, claimed 1000l.

The defendant pleaded,—first, not guilty,—secondly, that the said area was not immediately adjoining or under a common and public footway, as alleged,—thirdly, that the said Edwin James Robbins was not *lawfully passing over or along the said common and [*223 public footway, as alleged,—fourthly, that persons passing in and along the said footway were not, at the time the defendant was possessed of the said houses and premises and of the said area, in any danger of falling into the said area,—fifthly, that the said area and grating was no part of the common and public footway, and that, at the said time when, &c., the said Edwin James Robbins unlawfully and of his own wrong, with others, broke and entered the said grating, houses, and premises, and he and others were unlawfully

trespassing on the said grating and the said houses and premises, and crowding thereon, and by reason thereof the said grating fell in, and the said Edwin James Robbins was thrown down and injured as in the declaration mentioned. Issue thereon.

The cause was tried before Willes, J., at the sittings at Westminster after last Michaelmas Term. The history of the cause is fully given in the judgment of the court,—post, p. 236,—which was prepared by the learned judge who presided at the trial.

On the part of the defendant, it was contended that the pavement in question having been dedicated to the public and used by them prior to the passing of the General Highway Act of 5 & 6 W. 4, c. 50, the parish was bound to keep it in repair, and no duty was by law cast upon the defendant to do so; and, further, that, assuming the spot in question to be private property, the public had no right to congregate on it so as to render it dangerous.

The learned judge put the following questions to the jury:—

1. Was the flagging in question a nuisance causing danger to persons lawfully using the highway, even considered as bounded by the retaining walls of the bridge approaches?

*224] 2. Was it a nuisance causing danger to persons lawfully passing from the highway to the houses?

3. Were the flagging and grating in a fit state, regard being had to the safety of persons going to the houses?

4. Were they in a reasonably fit state, having regard to their user as a public footway?

5. Were they in a reasonably fit state for persons to stand or walk upon in any sense?

6. Was the accident occasioned by the access of an extraordinary crowd, or by the improper state of the flagging and grating, or by both combined?

7. Was the deceased guilty of any negligence or misconduct contributory to the accident?

8. Was the deceased, when he fell, lawfully using the place for the purpose of going to the house?

9. Was the spot in question a public highway?

The jury answered the 1st, 2d, 3d, and 8th questions in the affirmative, and the 4th and 7th in the negative. To the 5th they answered,—"Not in the sense of a crowd always liable to be gathered together, when used as a public highway;" to the 6th,—“By both;” and to the 9th,—“Used as such by dedication.”

The learned judge thereupon directed a verdict to be entered for the plaintiff, and the jury assessed the damages at 280*l.*, apportioning it as follows,—200*l.* for the widow, and 80*l.* for the child.

Lush, Q. C., in Hilary Term last, pursuant to leave reserved to him at the trial, moved to enter a nonsuit. He also moved for a new trial on the ground that the findings of the jury upon some of the questions put to them were not warranted by the evidence.

*225] *ERLE*, C. J.—As to the last ground, it seems that the *learned judge is not dissatisfied with the answers which were given by the jury; but we think the rule may go, for the purpose of considering their effect.

WILLES, J.—I should be inclined to say that the defendant would

be liable if the paving and flagging were not sufficient to bear a crowd such as reasonably might be expected to gather upon them. A way that is to be used by the public should be strong enough to hold up all persons lawfully using it. At all events, a jury might reasonably think so.

The rule was ultimately drawn up as follows:—To enter a nonsuit pursuant to the leave reserved, on the grounds,—first, that, on the finding of the jury that the locus in quo was a public highway, the liability to repair was on the parish,—secondly, that the obligation to repair, if not on the parish, was on the lessees,—thirdly, that the accident was occasioned by the negligence of the deceased: or for a new trial, on the ground that the several findings of the jury were against the weight of evidence.

Coleridge, Q. C., and *Martin*, in Easter Term last, showed cause.—The main question is, whether the defendant by his negligence either caused or materially contributed to the accident which resulted in the death of the plaintiff's husband. Now, it is an undisputed fact that the paving and grating in question were out of repair. The defendant's attention had been called to it, a communication having been made to his agent Lane, recommending that an arch be turned under the flagging: and this was prior to the demise to the Messrs. Jeffs. There are numerous cases to show that one who, having notice of its existence, suffers a dangerous nuisance to continue, is responsible for the *consequences. *Salmon v. Bensley*, R. & M. 189, and *The King v. Pedly*, 1 Ad. & E. 822 (E. C. L. R. vol. 28), 3 N. [*226 & M. 627, are to that effect. *Littledale, J.*, in the last-mentioned case, says: "If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no responsibility: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it." In *Rich v. Basterfield*, 4 C. B. 783 (E. C. L. R. vol. 56), where an action was brought against the owner of premises for a nuisance arising from smoke issuing out of a chimney, to the prejudice of the plaintiff in his occupation of the adjoining messuage,—on the ground that the defendant, having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein,—it was held that the action would not lie; the nuisance complained of, viz. the lighting of the fire, being the act of the tenant. *Cresswell, J.*, in delivering the judgment of the court, said: "If *The King v. Pedly* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed, or because he had re-let them after the user of the buildings had created a nuisance, or because he had undertaken the cleansing and had not performed it,—we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a

*227] *decision that a landlord is responsible for the act of his tenant in erecting a nuisance, by the manner in which he uses the premises demised,—we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it.” These cases are commented upon by this court in *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99), where it was held that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until by reason of the want of reparation they fall upon and injure the house of an adjoining owner; Erle, C. J., observing that they are authorities for saying, “that, if the wrong causing the damage arises from the non-feasance or the mis-feasance of the lessor, the party suffering damage from the wrong may sue him.” It is upon that principle, it is submitted, that the defendant is liable here. *Bishop v. Trustees of the Bedford Charity*, 1 Ellis & Ellis 697 (E. C. L. R. vol. 102), may be distinguished, on the ground that the defendants had no notice of the insecure state of the grating. *Fisher v. Prowse*, 2 Best & Smith 770 (E. C. L. R. vol. 110), is also distinguishable. The present case falls precisely within the principle of *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67). There, A., being possessed of land abutting on a public footway, in the course of building a house on such land, excavated an area, which, by the negligence of his work-people, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area and was killed: and it was held that A. was liable, under the 9 & 10 Vict. c. 93, to an action by the husband, as administrator, for the benefit of himself and B.’s infant children. Maule, J., in delivering the judgment of the court, after referring to nearly all the authorities, says: “The result is,—

*228] considering that the present case refers to a newly-made *excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,—it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for, the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.” So here is a nuisance or danger created close to and connected with a public way; and the deceased, through no negligence of his own, but solely through the negligence and want of care of the defendant, fell through and met with his end. In *Coupland v. Hardingham*, 3 Campb. 393,—which is cited with approbation in *Barnes v. Ward*,—the action was case for not railing in or guarding an area before a house in Westminster, whereby the plaintiff fell down into the area, and was severely hurt: the defence was, that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. But Lord Ellenborough held, that, *however long* the premises might have been in this condition, as soon as the defendant took possession of them he was bound to guard against the danger to which the public *had before been exposed*; and that he was liable for the consequences of having neglected so to do, in the same

manner as if he himself had originated the nuisance: and the learned judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house, to render it secure. In *The King v. Watts*, 1 Salk. 857, 2 Ld. Raym. 856, which was an indictment for not repairing a house standing upon the highway, ruinous and like *to fall down, which the defendant occupied and ought to repair *ratione tenuræ suæ*, the defendant pleaded [*229 not guilty, and the jury found a special verdict, viz. that the defendant occupied, but was only tenant at will. And Lord Holt said: "The *ratione tenuræ* is only an idle allegation; for, it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for, the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance." In *Corby v. Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 93), the owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there, in such a manner that the plaintiff in using the road sustained damage. It was held that A. was liable to an action for such injury. Cockburn, C. J., there says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum, as the means of access thereto. Could *they* have justified the placing an obstruction across the way whereby an injury was occasioned to one using the way by their invitation? Clearly they could not." And Willes, J., says: "One who comes upon another's land by the owner's permission or invitation, has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it." That case, which is altogether undistinguishable from the present, as well as *Hounsell v. Smyth*, 7 C. B. N. S. 731 (E. C. L. R. vol. 97), are referred to in *Bolch v. Smith*, 7 Hurlst. & N. 736, where the Court of Exchequer held, as this court *had done in *Hounsell v. Smyth*, that the defendant was under no obligation to fence against a [*230 danger on his own land, unless it was so placed as to amount to a public nuisance. It will be said that this place had become by dedication a part of the public highway, and consequently that the duty of keeping it in repair was by law cast upon the parish. It may, however, well be, that the public may acquire a right to go upon a man's land, and yet the parish may not be burthened with repair. This was a part of the defendant's premises, which for his own convenience he had allowed the public to use for the purpose of going to the shop windows. That there may be a conditional or partial dedication, is clear from *Lade v. Shepherd*, 2 Stra. 1004, *The King v. Lloyd*, 1 Campb. 261, *The Marquis of Stafford v. Coyney*, 7 B. & O. 257 (E. C. L. R. vol. 14), *Cornman v. The Eastern Counties Railway Company*, 10 Exch. 771, *Le Neve v. The Vestry of Mile End Old Town*, 8 Ellis & B. 1054, *Morant v. Chamberlin*, 6 Hurlst. & N. 541, and *Fisher v. Prowse*, 2 Best & Smith 770 (E. C. L. R. vol. 110). The user of this way by the plaintiff clearly was not an act of trespass.

[KEATING, J.—That is settled by the jury.] The public, then, having a right to go upon this spot, it was the defendant's duty to see that it was strong enough to bear such amount of traffic as might reasonably be expected in a London street. [BYLES, J.—The dedication here was prior to the General Highway Act, 5 & 6 W. 4, c. 50, and therefore the duty to repair the surface was by law cast upon the parish; *The King v. Leake*, 2 N. & M. 595, 5 B. & Ad. 469 (E. C. L. R. vol. 27).] A highway may be a highway for a limited purpose: *Roberts v. Hunt*, 15 Q. B. 17 (E. C. L. R. vol. 69), where Lord Campbell says that a man must calculate the consequences before he dedicates. In *The King v. Pedly*, 1 Ad. & E. 822 (E. C. L. R. vol. 28), 3 N. & M. 627, it was held, that, if the owner of land erect a building which is *231] a nuisance *or of which the occupation is likely to produce a nuisance, and lets the land, he is liable to an indictment for such nuisance being continued or created during the term: so also, if he let a building which requires particular care to prevent the occupation from becoming a nuisance and the nuisance occurs for want of such care on the part of the tenant. And in *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99), it was held by this court that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. *Brook v. Copeland*, 1 Esp. N. P. C. 203, and *Coupland v. Hardingham*, 3 Campb. 393, also show that this action is maintainable. [BYLES, J.—The jury have found that this way was dedicated to the public with the gratings in it. Who would be bound to repair the substructure?] The owner of the premises undoubtedly. As to the verdict being against evidence, it does not appear that the learned judge who tried the cause is dissatisfied with the result.

Lush, Q. C., and *David Keane*, in support of the rule.—The first proposition is abundantly sufficient to dispose of this case. One who dedicates a way to the public incurs no liability and is burthened with no duty to keep it in repair. If the public choose to use it, they must take it cum onere. Having once made the dedication, the owner of the soil can do nothing to derogate from his grant. *Fisher v. Prowse*, 2 Best and Smith 770 (E. C. L. R. vol. 110), is precisely in point. It was there held, that, where an erection or excavation exists upon land, and the land on which it exists, or to which it is contiguous, is dedicated to the public as a highway, the dedication *232] must be taken to be made to the *public and accepted by them subject to the inconvenience or risk arising from the existing state of things. The defendant occupied a house adjoining to a public street, with a cellar belonging to it, which cellar had existed before the defendant had anything in the house. The mouth of this cellar opened into the footway of the street by a trap-door. During the day, this trap-door was open, but at night it was closed by a flap, which slightly projected above the footway, and it had so projected as long as living memory went back. The plaintiff, coming along the footway at night, stumbled over this flap, fell, and sustained injury, for which he brought an action: and it was held that the jury ought to draw the conclusion that the cellar-flap had existed as long as the

street, and that the dedication of the way to the public was with the cellar-flap in it, and subject to its being continued there, and therefore that the defendant was not liable, as the maintenance of such an ancient cellar-flap was not unlawful. Blackburn, J., in delivering the judgment of the court, says: "We think we must, on this reservation coupled with the evidence, take it to have been proved that there was no negligence on the part of the plaintiff contributing to the accident, and that the flap did cause obstruction to the footway to such an extent that if the flap had been put down for the first time after the highway was dedicated to the public, it would have been a nuisance for the consequences of which those who maintained the nuisance would be responsible. On the other hand, we must take it to have appeared that the flap continued in its original condition, and that the defendant had not altered it or suffered it to get out of repair, so as to increase the danger and obstruction beyond what always must have existed since it was there. And we think, that, on its being shown that the cellar-flap had *existed in its present condition as far back as living memory went, the jury ought to draw the con- [*233] clusion that it had existed as long as the street, and that the dedication of the way to the public was with this cellar-flap in it, and subject to the reservation of its being continued there, so far as by law the highway could be subject to it." In *Cooper v. Walker*, 2 Best & Smith 770 (E. C. L. R. vol. 110), in which judgment was given at the same time as that of *Fisher v. Prowse*, the declaration was for negligently and improperly placing in a public street certain steps, so that the same were an obstruction to persons using the street, and dangerous to persons passing along it at night; and averring that the plaintiff, passing along the street, fell over them and was injured. The defendant pleaded that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway and leading up to the outer-door of the house, all persons passing along the highway being entitled to pass on foot over the steps as a part of the highway, which steps were part of the house; that, the street being lowered under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the old steps were necessarily removed, and the present steps placed in their room; and that the new steps were placed on the same part of the highway on which the old steps had stood, and caused no greater obstruction or danger than did the old steps: and it was held that the plea was good, as the former highway was subject to the right on the part of the occupiers of the defendant's house to keep these steps there, and the lowered highway was subject to a similar right. In delivering judgment, Blackburn, J., says (p. 779): "The law is clear, that, if after a highway exists anything be newly made so near to it as to be dangerous to those using the highway,—such, for instance as an excavation, *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67),—*this will be unlawful, and a nuisance; as [*234] it also is if an ancient erection, as, a house, is suffered to become ruinous,—*The Queen v. Watts*, 1 Salk. 357: and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as much as if the nuisance arose from an obstruction in the highway itself: but the question still remains, whether an erection or excavation already existing, and not otherwise unlawful

becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise, if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere user. For *235] instance, the owner of the bank of a *canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so, if the consequence were, that he was bound to fill up or fence off his canal." [WILLES, J.—The evidence was, not simply that the flagging and grating were out of repair, as such; but that the proper thing to do to make the way fit for the public user, was, to turn an arch under it,—which nobody suggested would have been necessary if it had been used as a private way only.] It may be that a structural change might have become necessary in consequence of the long user of the way by the public. But this was a burthen which the law does not cast upon the owner of the adjoining property: it was the duty of the parish. In *Gale on Easements*, 8d edit. 424, it is said: "As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything,—the burthen of repair falls upon the owner of the dominant tenement. 'Where I grant a way over my land, I shall not be bound to repair it,' said Twisden, J., in *Pomfret v. Ricroft*, 1 Saund. 322 a. 'By the common law of England, he that hath the use of a thing ought to repair it,' said Lord Mansfield in *Taylor v. Whitehead*, 2 Dougl. 745. 'The grantor of a way is not bound to repair it if it be foundrous:' 1 Wms. Saund. 322 c. *Comyns's Digest*, *Chimin* (D. 6.) This is in accordance with the principles of the Civil law, which imposed the burthen of repair in cases of easement upon the owner of the dominant, and not upon the owner of the servient tenement." If the court hold the lessee of the property responsible under such circumstances as these, it will be carrying the liability of the owners of property very much further than *286] has ever yet *been done. In *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99), the defendant, when he let the house,

knew of its dangerous condition. So, in *The King v. Pedly*, 1 Ad. & E. 822, 3 N. & M. 627, the defendant let the land with the nuisance existing: it was upon this ground that that case was sustained in *Rich v. Basterfield*, 4 C. B. 783, 805 (E. C. L. R. vol. 56). Here, however it is not shown that the defendant did any act amounting to negligence. If there was any obligation upon anybody to repair, it was upon the lessees who were in possession by their tenants.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court.^(a)

This was an action brought by the administratrix of one Robbins, to recover damages under Lord Campbell's Act, 9 & 10 Vict. c. 93, for the intestate's death.

That death took place in consequence of the giving way of a portion of the east side of the public way leading to the south end of Waterloo Bridge, by the default, as it is alleged, of the defendant. The part which gave way consisted of flagging and a grating over the area of one of the houses at the side of the road.

The material facts are as follows:—Waterloo Bridge was constructed under acts of parliament passed in the 53d, 56th, and 58th years of G. 3,^(b) and was finished in 1817. It was necessarily constructed so that the roadway should be at a level much higher than the river banks: and, in order to give access to the roadway of the bridge so constructed, the road leading to the south end of the bridge approaches it *upon a high causeway springing at a considerable distance. [*237 For some distance from the bridge persons passing along the causeway were protected against the danger of falling over the side by a parapet-wall or continuation upwards of the retaining wall of the causeway. This wall is continued up to a row of houses of which the defendant is the lessee, and then ceases. This row of houses stands upon the original level of the ground, and runs parallel to the causeway and road leading to the bridge,—leaving a gulf or space of more than seven feet wide between the houses and the retaining wall of the causeway. That space belongs to the owner of the houses; and the bottom of it is used for areas.

The houses are divided, or capable of being divided, into two distinct dwellings, having separate outer doors. The outer door of the lower part of each building opens into a street or court upon the lower level. The outer door of the upper part of each house opens upon the level of the causeway towards the road leading to the bridge; and the inhabitants of the upper part of the house go in and out by that door, and get to and from the road by walking upon the structure part of which gave way under the deceased.

That structure consisted of flag-stones resting at one end for about four inches in and upon the walls of the houses, and at the other end for about six inches upon the retaining wall of the causeway, so as to bridge over the areas. At intervals there were gratings fixed by means of horns into the flags, and forming with them one continuous footway. The gratings were not attached to the houses, but were fixed in the centre of the flagging, and served the double purpose of being walked upon and of letting through light to the back part of

(a) The case was argued before Erle, C. J., Willes, J., Byles, J., and Keating, J.

(b) 53 G. 3, c. clxxxiv., 56 G. 3, c. lxxiii., and 58 G. 3, c. xxviii.

the tenements below. The part of this structure lying straight *238] between the doors and the *roadway was flagging, so that it was not necessary to walk upon the gratings in order to get to the houses. There was a flagged foot-pavement between the edge of the flagging and grating and the carriage-way, on the same level with the flagging and grating over the areas. Between it and the flagging and grating there was a narrow strip of gravel. The end houses of the row had no flagging and grating; and the space over their areas was enclosed. The road on the causeway was a common highway, to be repaired by the parish.

In the course of time, before the General Highway Act of 5 & 6 W. 4, c. 50, the flagging and grating had been dedicated to the public and used by them as part of the highway for foot-passengers; and it so continued up to the time of the accident.

The fee-simple of the houses was in Lord Salisbury. The defendant was tenant under him for a term of years created in 1830, and assigned to the defendant before and vested in him at the time of the accident. Whilst he was in possession, the flagging and grating either became or at least were out of repair and insufficient, whether considered as a passage to the houses or as part of a public way, having regard to the tendency of persons to collect in crowds in or near such ways upon the occasion of a fire or the like.

It did not appear that any substructure was out of repair, but only that the flagging and gratings forming the surface were out of repair. It became necessary, in order to effectually sustain the flagging and grating as a way, in the state to which time and wear and tear had reduced them, to make an entirely new work, viz. to turn an arch under them, and so to make them safe. The defendant had notice of this from the parish in 1859, some time before the accident, whilst he was in possession: but no repairs were done between that time and the time of the accident.

*239] *The defendant afterwards underlet to two persons named Jeffs, who again underlet to a person who let the rooms out to lodgers.(a) The rent due from the lessees fell into arrear, and a distress was put in upon the lodgers, who, having paid their own rent, barred out the bailiff, who had gone out for refreshment. The bailiff proceeded to regain possession by force, and a crowd collected and stood thick upon one of the gratings. The deceased was passing by at the time, and, being beckoned to by one of the lodgers, he tried to get through the crowd to the door, and in doing so stepped on to the grating. Scarcely had he set foot upon it when the grating and the flagging resting upon the house wall, and a portion of that resting upon the retaining wall of the causeway, gave way, and the deceased fell, with about thirty others, down into the area, and so met his death.

The fall of the flagging and grating was caused by their insufficiency and by the extraordinary crowd pressing upon them at the time.

The cause was tried at the sittings after last Michaelmas Term. There was conflicting evidence upon the question of repairs and

(a) The lease granted to the Jeffs was surrendered to the defendant, upon their bankruptcy, on the 6th of March, 1862.

sufficiency: but the above must be taken to be the result of the evidence, as established by the verdict. Under the direction of the judge, a verdict was found for the plaintiff, for 280*l.* damages, subject to the opinion of the court as to the defendant's liability. No question was raised upon the pleadings; nor could any usefully have been raised, as the court has power to amend: and the question has been treated as arising upon the general issue. Probably it arises also upon the record.

A rule was obtained to enter the verdict for the defendant, or a nonsuit, which was well argued in last *Easter Term, before my Brothers Willes, Byles, and Keating, and myself, when we [*240 took time to consider of our judgment.

It is for the plaintiff to make out that the defendant has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so, may be considered under the following heads:—

1. If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any. In this case there was none,—not that that circumstance makes any difference in our opinion.

2. If it be considered as a public way, then the defendant is not answerable for the area as for a hole made at the side of the highway, because there was no hole made by the defendant. The gulf at the side of the causeway was the result of its being raised by the makers of it, not by the land at the side being excavated by the proprietors of it. The alleged hole was coeval with the highway, and a consequence of the making thereof. In *Barnes v. Ward*, 9 C. B. 392, there was a hole made by the defendant, and it was made after the dedication of the road.

3. As for the suggested liability to repair, upon the ground that the construction was beneficial to the proprietor of the houses, that benefit was only retained by, not conferred upon him. It is familiar law, that a bridge made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder. The liability to repair a highway has not been made to depend *upon the quantum of benefit. If it were so, [*241 a man who drove a flourishing trade in the house ought to pay for the benefit from passers by, but not a musician or the inventor of the calculating-machine.

4. The flagging and grating were not, like a door, under the control of the occupier, but fixed. They were not worked, used, or worn out by the proprietor of the houses, otherwise than as one of the public uses a public highway on the side of which his house stands. The passage of light and air through the grating does not wear it out any more than the wind wears out the surface of the road.

5. The more or less artificial character of the flagging and grating does not make it more or less a way to be repaired by the parish. Whether it be stone, iron, wood, or composition, as it is a public way,

the public are to keep it in repair, and not the person who dedicated it. Hitherto, the exceptions to the liability of the parish have been known. They are custom, prescription, tenure, and enclosure whilst it lasts. Have we authority to add flagging and grating?

6. The case is not the same as that of an open cellar-flap, which may be considered as a trap in its nature and essence, unless it be kept shut. Besides, that is worn out by use for the benefit of the occupier of the cellar to which it is the door. The present case is nearer to that of a mine propped up, and a way dedicated upon the surface. In such a case, will any one venture to suggest that the owner of the mine and surface, or either of them, must renew the props when they rot and the road threatens to sink into the mine?

7. This does not fall within the law as to keeping buildings adjoining a highway in such a state, by repair or otherwise, as not to endanger passers by. What was insufficient here, was part of the highway itself. Such law may apply to the arches of a cellar *under a *242] footway,—though this we conceive to be worthy of argument, and open to distinctions as to the state of things at the time of the dedication, and other circumstances. It cannot apply to the footway itself. We may refer, by way of illustration only, to the case of one of the squares, where the footway at one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There, the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend, the public, who walk upon it and wear it out, without which it might last an indefinite time.

It is to be observed, that, in cases of liability under this head, the building need not be repaired, but only prevented from causing injury by its fall; which implies that there is a power to remove: and such power does not exist in this case.

8. It has been suggested, in addition to the grounds relied upon in argument, that the fact of the flagging and grating concealing danger, was a special cause of liability. To this we answer,—first, that the flagging and grating did not prevent the existence of the deep area from being known to everybody passing, and there was no fraud,—secondly, that there would have been no danger, if the parish had properly maintained and repaired the flagging and grating,—thirdly, that the defendant did not erect, and, as it was a highway, could not have removed, the structure. Moreover, concealment is relative; and every such danger is more or less concealed. If a highway is dedicated, with a dangerous obstruction on it, such as would have been a nuisance if placed upon an ancient way,—for instance, a flight of steps, or a projecting flap,—no action can be maintained for injury caused thereby, whether by day, when it can be seen, or by night, *243] *when it is invisible. In such a case, it was held by the Court of Queen's Bench, in *Fisher v. Prowse*, 31 Law J., Q. B. 212, 2 Best & Smith 770, that the public adopting a highway must take it in statu quo, and that no obligation is imposed upon the dedicator to remove projections or fill up holes which may be dangerous to passers by. In that leading case, which explained and overruled several out of which vague notions of liability have sprung up, my Brother

Blackburn, delivering the judgment of the court, expounded with clearness and force the law applicable to this supposed ground of liability, as follows:—"But the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists or to which it is immediately contiguous is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconveniences or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is of course not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise, if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and *loss, and to make further concessions to the public altogether beyond [*244 the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer (a) may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired: it would be doubly so if the consequence was, that he was bound to fill up or fence off his canal." In this statement of the law we heartily concur. It is in accordance with the general law as to gifts, which, in the absence of fraud, must be taken as they are, without redress against the donor in respect of vice apparent or secret, and all expenses in respect of which, for repairs or otherwise, are to be borne by the donee.

9. This conclusion is also in accordance with the law as to grants of a right of way or other easement, whether for valuable consideration or not, to the effect that the grantee and not the grantor is to maintain and repair the subject of the easement, with a corresponding duty to do so if by his neglect the grantor may suffer damage, and a corresponding right to enter upon the grantor's land and to do all acts necessary for such maintenance and repair.

The authorities to this effect in our own law, the Civil law, and the Code Civil, will be found in Gale on Easements, edition by Mr. Willes, 424 et seq.

It thus appears to us, that, to hold this action to be maintainable, whilst it would for the first time impose a heavy burthen upon rever sioners, would violate well-established principles of law.

The rule to enter a nonsuit must therefore be made absolute.

Rule absolute.

***245] *WHITE and Others v. PHILLIPS and Others. Nov. 13.**

One who erects or keeps erected on the shore of a navigable river between high and low-water mark a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction or from want of repair, presents a dangerous (hidden) obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge of it.

The defendants were possessed of a wharf abutting on the river Thames, the soil in front of which was for the more convenient access thereto excavated by their predecessor, who placed there a campehed, a structure of piles and planks to keep up the adjoining soil. This campehed was originally improperly constructed, and was suffered to be out of repair. A barge of the plaintiffs was brought to the wharf for the purpose of receiving goods by means of the wharf crane from a schooner which was moored alongside and was discharging her cargo at the wharf, and those in charge of her, not being aware of the existence or the condition of the campehed, so moored the barge, that, on the tide receding, she came upon one of the piles, which forced a hole in her bottom, and the barge and its contents were damaged:—

Held, that these facts disclosed a duty in the defendants to keep the campehed in repair or give notice of the danger, and a breach of that duty for which they were responsible in damages; and that it was immaterial whether or not the plaintiffs paid for the use of the wharf or the crane.

THIS was an action brought by the plaintiffs to recover compensation in damages from the defendants, the occupiers of a wharf on the banks of the Thames, for injury done to certain slabs of marble through the grounding of a barge in which they were contained upon an obstruction which it was alleged the defendants had wrongfully permitted to exist in the bed of the river adjoining their wharf.

The declaration stated that the defendants, before, up to, and after the happening of the damage thereafter mentioned, were in possession of and had the care and management of a certain wharf on the banks of a certain navigable tidal river, to wit, the Thames, commonly called and known as St. Bride's wharf, and which said wharf was used by the defendants for the reception thereof of the barges and goods of customers in the defendants' trade of wharfingers, and the said navigable river was the usual and ordinary means of approach to the said wharf for such barges and goods; and that the defendants, being in the possession of and having the care and management of the said wharf as aforesaid, wrongfully and negligently erected or caused to be erected or kept erected in the bed of the said river, and close *246] against the wall of the said *wharf, and adjoining the said navigable river, and driven into the ground at the outside base of the said wall, a certain campehed or mass of piles, at such a height and in such a manner as that the same was at the time of high tide on the said river covered with water and concealed and out of view, and in such a position and at such a depth that vessels and barges coming to or lying alongside the said wharf at high tide would necessarily be and were in danger (unless the persons navigating and directing the same had notice of the said campehed or mass of piles so lying and being there) of striking and being dashed against the same at the fall of the tide, and thereby of being greatly injured and damaged,—of all which premises the defendants always had due notice, and could, might, and ought to have done their duty therein; yet they suffered and permitted the said campehed and mass of piles to be and continue at the time of high tide wholly covered and concealed and out of view, and in such a position and at such a depth as aforesaid, and the same did continue wholly covered and concealed

and out of view, and in such a position and at such a depth as aforesaid, without the defendants taking or causing to be taken any proper care or precaution in that behalf, and without using or causing to be used any proper means to prevent or guard against the said danger, or whereby the said danger might be prevented or guarded against, to vessels, ships, or barges at high tide coming to or lying alongside the said wharf, or without putting or causing to be put or placed near the said campshed or mass of piles any proper or sufficient buoy or other sufficient mark or signal to give due notice or warning of the said danger: that, whilst the said campshed or mass of piles was and continued to be so covered or concealed as aforesaid, without any proper or sufficient buoy or other *proper or [247 sufficient signal, or any other due and proper means being used to give notice or warning of the said danger, and whilst the said campshed or mass of piles and the said wharf and wall were in the possession and control of the defendants, the plaintiffs were lawfully possessed of a certain barge with certain goods of the plaintiffs on board thereof, which was then lawfully navigating the said river, under the care, direction, and management of certain mariners and servants in that behalf of the plaintiffs; and the plaintiffs, by the permission and at the request of the defendants, just before the time when, &c., for reward and payment to them the defendants, brought the said barge, with the said goods on board, by their said mariners and servants, unto and alongside the said wharf of the defendants at high tide, for the purpose of loading there, as customers of the defendants as such wharfingers, a certain cargo on the said barge; and the said barge being then so brought and at the time of high tide lying alongside the said wharf, and the plaintiffs and the said mariners and servants of the plaintiffs not having any knowledge or sufficient means of knowledge of the said danger, and no due or proper care being taken by the defendants to guard against the same, and the plaintiffs by their said mariners and servants then having lawful occasion and being directed by the defendants for the purpose aforesaid to place and moor, and to keep placed and moored, their said barge at such high tide, with the said goods of the plaintiffs on board, immediately over the place where the said campshed or mass of piles so lay covered and concealed as aforesaid, the plaintiffs by their said mariners and servants did then at such high tide place and moor their said barge immediately over the said place, and kept it so placed and moored, and thereby afterwards and by means of the premises, *and of the said misconduct, omission, and neglect of [248 the defendants, and without any neglect or default of the plaintiffs or their said mariners and servants, the said barge, whilst the said campshed or mass of piles and the said wharf and walls were respectively in the possession and control of the defendants, at and by reason of the fall of the tide struck with great force and violence upon and against the said campshed or mass of piles, whereby the said barge heeled over and was swamped and stove in, and the said goods of the plaintiffs greatly injured; and the plaintiffs incurred great expense in clearing the water from the said barge, and in surveying and repairing the damage done to the same, and in recovering and repairing the said goods of the plaintiffs; and the plaintiffs lost

the use of the said barge for a long time, and the freight and profits which they might have derived therefrom. Claim, 300*l*.

The defendants pleaded,—first, not guilty,—secondly, a denial that they erected the campshed or kept it erected,—thirdly, that they had not notice, as alleged,—fourthly, that the plaintiffs did not bring their said barge to the wharf at high tide for the purpose alleged,—fifthly, that the plaintiffs had due and timely notice of the campshed, and of the danger arising therefrom,—sixthly, that the plaintiffs had not lawful occasion and were not directed by the defendants to moor the barge as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term. The facts which appeared in evidence were as follows:—The defendants were wharfingers, and had occupied St. Bride's wharf for about two years. The former occupier, one Innes, had, several years ago, excavated the soil of the river in front of the wharf for the purpose of allowing vessels to come up to it to load and *249] *unload, placing at the extremity of the wharf wall between high and low water mark a campshed, consisting of piles driven into the bed of the river and planking attached thereto with bolts, for the purpose of keeping up the soil in front of the adjoining wharf. This campshed (which was covered at high water, but exposed at low water), instead of sloping off to nothing towards low-water mark, terminated abruptly at a point nearer to the wharf, and had become out of repair before the defendants' occupation of the wharf commenced, part of the planking having worn away or been broken off, leaving the piles projecting so as to present a dangerous obstacle to any vessel which might settle upon them. The defendants' attention had been drawn to the condition of this campshed by the occupier of the adjoining wharf, and they had inquired what would be the cost of putting it into a proper state: but, finding that it would require an outlay of 30*l*., they declined to do it, alleging that the wharf had already cost them so much money. They, however, did some slight repair to the structure; but the first barge that came to the wharf knocked it away. The engineer of the Thames conservators, who had examined the spot since the accident, stated that the campshed was improperly constructed, and in a dangerous condition, and that, if his attention had been drawn to it, he would have called upon the defendants to repair it.

The plaintiffs had brought their barge to the wharf for the purpose of receiving certain slabs of marble from a schooner which was lying alongside. Coming there at high water, the lighterman in charge of the barge did not see the piles, and, as he stated, was not aware of the existence of the campshed, nor did he receive any caution on the subject. The marble was raised from the hold of the schooner by *250] means of the wharf crane: but the evidence was *conflicting as to whether or not it was ever landed on the wharf: and there was no evidence that anything was paid *by the plaintiffs* for the use of the crane. As the tide ebbed, the barge, with the marble on board, settled down upon one of the piles of the campshed, and before those on board could get her off, a hole was thereby made in her bottom, and the slabs of marble were in consequence tilted over and damaged.

Witnesses were called on the part of the defendants to prove that the plaintiffs' lighterman had been duly cautioned, and that the accident was entirely the result of his negligence: and it was contended on their behalf, that the wharf was not being used by the plaintiffs as a wharf, the permission to use the crane for the purpose of hoisting the marble from the schooner to the barge being the gratuitous act of the foreman of the wharf; and that no duty was, under the circumstances, by law cast upon the defendants as occupiers of the wharf to repair the campshed erected by their predecessors in the bed of the river.

The case was presented to the jury in a manner which was not complained of, and they returned a verdict for the plaintiffs. Leave was reserved to the defendants to move to enter the verdict for them, if the court should be of opinion that the facts alleged in the declaration and proved at the trial did not disclose the breach on their part of any legal duty.

Montagu Chambers, Q. C., on a former day in this term, obtained a rule nisi accordingly.

Parry, Serjt., and *Garth*, now showed cause.—The gravamen is, that the defendants kept in a navigable river an obstruction which amounted to a public nuisance, and that the plaintiffs, lawfully using the river, suffered damage in consequence. The case falls [*251] *precisely within the principle of *White v. Crisp*, 10 Exch. 312, where it was held, that, where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it. *Alderson*, B., in delivering the judgment of the court, there says,—“The subject was discussed by Mr. Justice Maule in an elaborate judgment in the case of *Brown v. Mallett*, 5 C. B. 599 (E. C. L. R. vol. 57), and from the principles there laid down by him (which, however, were not absolutely necessary for the decision of the individual case), we do not disagree at all. He there lays it down thus,—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others: and he adds that his liability is the same whether his vessel is in motion or stationary, floating or aground, under water or above it: for, in all these circumstances, the vessel may continue to be in his possession and under his management and control.” Here, the defendants, being occupiers of the wharf with the campshed, and having notice that it was in a ruinous state and dangerous to vessels coming to the wharf, they were clearly guilty of a breach of duty in continuing it in that condition.

Montagu Chambers, Q. C., and *J. Brown*, in support of the rule.—The material allegations in the declaration, it is submitted, were not proved: there was no evidence of any breach by the defendants of any duty cast upon them by the law. The campshed being in the bed of the river between high and low-water mark, and vested by statute in the Thames *conservators, any person touching it [*252] without their consent would be guilty of an illegal act. It may be that the parties who let the wharf to the defendants with this

ruinous appendage might be liable, according to the decision of this court in *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99); but there was no evidence here that the defendants ever used the campshed. In *Brownlow v. The Metropolitan Board of Works*, 13 C. B. N. S. 768 (E. C. L. R. vol. 106), the metropolitan board of works having, with the consent of the Thames conservators under the 21 & 22 Vict. c. 104, s. 28, but without the consent of the Admiralty (under s. 27), driven piles into the bed of the Thames, and so left them as to obstruct the navigation,—it was held that they were liable to an action at the suit of the owner of a vessel which had sustained damage by grounding on such piles, without any negligence on the part of those in charge of her. If a vessel be sunk in the bed of a navigable river, or a mooring-anchor lawfully placed there shifts its position, the owner of the sunken vessel or of the mooring-anchor has been held not to be liable for damage done to a vessel striking thereon, no duty being cast upon him by law to place a buoy or to take any other precaution to warn persons navigating the river of the hidden danger: *Brown v. Mallett*, 5 C. B. 599 (E. C. L. R. vol. 57); *Hancock v. The York, Newcastle and Berwick Railway Company*, 10 C. B. 348 (E. C. L. R. 70). *Chapman v. Rothwell*, E. B. & E. 168 (E. C. L. R. vol. 96), is distinguishable on the ground put by Erle, J., viz., that there the party injured came by the invitation of the defendant to the place where the dangerous trap-door was. Here, the defendants were guilty of no wrong; and the plaintiffs were not coming to the wharf as customers, but merely to take the marble from on board the schooner; and therefore the defendants incurred no greater responsibility than the defendant in *Southcote v. Stanley*, 1 Hurlst. & N. 247, did to the *253] plaintiff, a visitor, who sustained injury by running against a glass-door of the existence of which he had no notice.

ERLE, C. J.—I am of opinion that this rule should be discharged. The first and main question is, whether the evidence given at the trial showed a breach of duty on the part of the defendants. The substantial facts were these,—The defendants were the occupiers of a wharf on the banks of a navigable river, which had been excavated by their predecessor for the more convenient enjoyment of the wharf, the soil of the river in front of the adjoining wharf being supported by a campshed which, if it had been properly constructed and properly kept in repair, would have caused no damage to any one. The campshed not having been properly constructed,—inasmuch as it terminated abruptly, instead of sloping down gradually towards low-water mark,—and being suffered, whilst the wharf was in the defendants' occupation, to be out of repair, the plaintiffs' barge, being lawfully at the wharf for the purpose of taking on board certain marble slabs, settled down, as the tide receded, upon one of the piles which composed the campshed, and the barge and her cargo sustained damage. It sufficiently appears, I think, that a duty was by law cast upon the defendants, as occupiers of the wharf, either to keep the campshed in repair or to give notice to persons coming to the wharf of the hidden danger. It is true, the campshed was constructed by Innes, the predecessor of the defendants, and not by the defendants themselves: but the defendants, when they succeeded Innes in the occupation of the wharf, succeeded also to the benefit of the campshed. That they

had control over it, was clear. And, when its condition was pointed out to them by the occupier of the adjoining wharf, and they [*254] *were requested to repair it, they objected to do so on account of the expense: and they afterwards made an abortive attempt partially to repair it, and ultimately, after the accident, made it safe. All this showed that it was a thing which they might have repaired without incurring any danger of being treated as trespassers by the Thames conservators: and I am of opinion that the facts abundantly showed that the defendants were guilty of a breach of a private duty in not doing the repairs before. I also think the verdict may be sustained upon the second ground urged on the part of the plaintiffs. In a navigable river, in a spot which is accessible to all persons at high tide, a structure is placed making the navigation dangerous to those who use it. It may be that there is some prescriptive custom by which campsheds between high and low-water mark may be lawful: but such a privilege, if it exists, can only extend to such structures as are properly constructed and repaired, and guarded by proper precautions to prevent accidents to the subjects of the Queen lawfully using the highway. In either view, therefore, it was the plaintiffs' duty to keep the campshed in a proper condition, and to give due notice if it were out of repair. It has been said that the plaintiffs' barge was there without profit to the defendants, and therefore that the plaintiffs would have no greater claim against them than the visitor who met with an accident at the house of a friend through running against a glass door was held, in *Southcote v. Stanly*, to have against his host. I do not think that point was made at the trial: and, if need had been, I was prepared to dispose of it. The schooner was at the wharf in the ordinary way of business; and the master of the schooner, as a customer of the wharf, got permission to use the wharf crane for the purpose of lifting the slabs from the schooner to the barge. That *was a use of the wharf in the ordinary way; [*255] and whether cramage was to be paid by the master of the schooner, or by the plaintiffs, or by nobody, to my mind makes no difference. The point certainly was not discussed at all at the trial: and, if it had been insisted upon, no doubt more evidence might have been given upon the subject. Upon the whole, I am of opinion that the liability of the defendants for the damage complained of was fully made out.

WILLIAMS, J.—I also am of opinion that the plaintiffs are entitled to succeed. The real question before us appears to me to be, whether sufficient of the allegations in the declaration were proved to constitute a cause of action. In strictness, according to the doctrine laid down by this court in *Brown v. Mallett*, 5 C. B. 599 (E. C. L. R. vol. 57), the declaration would have been in the same plight if the allegation that it was the duty of the defendants to do that which it is said they failed to do had been altogether omitted,—the allegation of duty being mere surplusage. The question then is, whether the allegations in this declaration which state the damage complained of to have occurred through conduct of the defendants for which they are responsible, are proved. It seems to me that enough was proved to constitute a cause of action. I would rather not ground my decision upon the second point put by my Lord,—not that I entertain any

doubt as to the correctness of what he has laid down. I do not take upon myself to decide that this campshed, though out of repair, was a public nuisance. It is unnecessary to go into that; there being enough on the first ground to show that the defendants here are liable. Was the campshed kept and continued in the bed of the river by the defendants? It has been contended by Mr. Chambers that it was not, *256] it not having been originally *placed there by them, and the defendants having no right to meddle with it, but being liable to be treated by the Thames conservators as trespassers if they in any way interfered with it. The facts, however, show that the campshed was conducive to the more convenient occupation of the wharf, and that the defendants had taken the benefit of it, and had so conducted themselves with regard to it as to show that they considered it as part of the machinery essential to the carrying on of the business of the wharf. That being so, the evidence shows that the damage to the plaintiffs' barge was caused by its bottom coming upon the sunken pile on the receding of the tide, without any negligence on the part of those in charge of her, when moored for a lawful purpose alongside the defendants' wharf. The question is, whether the defendants were not bound to repair the campshed, or to give notice to persons using the wharf as a wharf, so as to enable them to avoid the danger. It seems to me that they were, and that for the neglect of that duty they are responsible in damages. I think all the material allegations in the declaration were proved, and that the plaintiffs are entitled to retain the verdict.

BYLES, J.—I am of the same opinion upon both grounds. There are, no doubt, many structures of this kind on both shores of the river Thames which are not nuisances. But, upon the evidence given upon the trial of this case, there can be no doubt that the campshed in question was originally constructed improperly and was suffered to become and to continue out of repair and dangerous to persons navigating the river, and that the plaintiffs gave no notice of the danger. The evidence was strong to show that it was a public nuisance. The schooner was at the wharf unloading, and the barge was there for the *257] purpose of *receiving the marble from the schooner by means of the crane belonging to the wharf. I therefore think the barge was there at the request and for the profit of the defendants. On both grounds, therefore, I think the plaintiffs are entitled to the verdict.

KEATING, J.—I am entirely of the same opinion. Agreeing with Mr. Chambers, as I do, that all the material allegations in the declaration are put in issue, I think there was abundant evidence to warrant the jury in finding for the plaintiffs.

Rule discharged.

FELKIN, Appellant; BERRIDGE and Another, Respondents.

Nov. 11.

The 72d section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), required certain notices to be given to the local board of health before the laying out, making, or building upon any new street. This provision is repealed by the Local Government Act, 1858 (21 & 22 Vict. c. 98), except (s. 9) as to "proceedings, matters, and things respectively begun or made" under any section of the former act:—

Semble, that, where the proper notices had been given and plans lodged under the Public Health Act, this was a "matter or thing begun or made," within s. 9 of the Local Government Act, although little or nothing appeared to have been done towards the formation of the streets of which notice had been given.

THIS was a case stated for the opinion of the court, under the 20 & 21 Vict. c. 43.

At a petty sessions holden at Sittingbourne on the 2d of June, 1862, Richard Berridge and Henry Bateman Jenkins, hereinafter called the respondents, appeared to answer a complaint laid against them by Edward Felkin, the clerk to the Sheerness local board of health, hereinafter called the appellant, which charged that the said Richard Berridge and Henry Bateman Jenkins, the owners of certain land within *the district of Sheerness, lying between Berridge [*258 Road or Green Street, Marina Town, and Marine Terrace, Ward's Town, near Sheerness, did on the 12th of March last offend against a certain by-law (No. 28) duly made in that behalf by the local board of health pursuant to s. 34 of the local Government Act, 1858, (21 & 22 Vict. c. 98), confirmed, printed, and hung up as required by the same act, and then and still in force, that is to say,—For that the said Richard Berridge and Henry Bateman Jenkins did lay out a new street within the said district, to wit, from and out of a certain road leading from Banks Town to Cheyney Rock, to a certain chapel of and belonging to a society called 'The Bible Christians' Association at Marine Town, in the said district, and did not nor did either of them give one month's notice to the local board of such intention, by writing delivered to the local surveyor, or left at his office, as required by the said by-law, in contravention thereof; and that the said Richard Berridge and Henry Bateman Jenkins did not, nor did either of them, leave or cause to be left at the office of the said surveyor a plan or section of such intended new street, as required by the said by-law, in contravention thereof.

By section 72 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), it is enacted "that one month at the least before any street is newly laid out as aforesaid, written notice shall be given to the local board of health, showing the intended level and width thereof: and the level and width of every such street shall be fixed by the said local board; and it shall not be lawful to lay out, make, or build upon any such street otherwise than in accordance with the level and width so fixed, unless, upon disapproval by the said local board of the level and width specified in such notice, the general board of health shall otherwise *direct; and whosoever shall lay out, make, or build upon [*259 any such street otherwise than in accordance with the level and width fixed by the said local board, or approved by the said general board, shall be liable for every such offence to a penalty not exceeding 20*l.* for every day during which he shall permit or suffer such

street to continue to be so improperly laid out, made, or built upon: and the said local board may, if they shall think fit, cause any such street laid out or made at a level or width otherwise than in accordance with the level and width so fixed or approved as aforesaid, or any building built in any such street otherwise than in accordance with such level and width, to be altered in such manner as the case may require; and the expenses incurred by them in so doing shall be repaid to them by the offender, and be recoverable from him in a summary manner: Provided always, that, if no such level or width be fixed, and no approval or disapproval of the level or width proposed be signified by the said local board within one month from the last-mentioned notice, the intended street may be laid out and made upon the level and of the width specified in such notice, if the same be otherwise in accordance with the other provisions of this act."

The Local Government Act, 1858 (21 & 22 Vict. c. 98), took effect in the district of Sheerness local board of health from the 1st of September, 1858.

By section 34 of this act it is enacted that the 53d and 72d sections of the Public Health Act, 1848, shall be repealed; and in lieu thereof be it enacted as follows:—

"Every local board may make by-laws with respect to the following matters, that is to say,—1. With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof,—2. With respect to the structure of walls, &c.,—3. With *respect to the sufficiency of space about buildings, &c.,—4. *260] With respect to the drainage, &c.: and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such by-laws."(a)

A copy of the by-laws of the Sheerness local board of health, made on the 25th of October, 1860, in pursuance of this section, accompanied, and, so far as was material, was to be taken as part of the case.

By-law No. 28 is as follows:—"Every person who shall intend to make or lay out any new street, whether the same shall be intended to be used as a public way or not, shall give one month's notice to the local board of such intention, by writing delivered to the local surveyor, or left at his office, and shall at the same time leave or cause to be left at the said office a plan and section of such intended new street, drawn to a scale of not less than one inch to every 44 feet; and every such plan shall show thereon the names of the owners of the land through or over which such street shall be intended to pass, the level, width, direction, the proposed mode of construction, the proposed name of such intended new street, and its position relatively to the streets nearest thereto, the size and number of the intended building lots, and the proposed sites, height, class, and nature of the buildings to be erected therein, and the proposed height of the division and fence-walls thereon; and shall contain the name and address of the person

(a) See *Cooper v. The Wandsworth Board of Works*, 14 C. B. N. S. 180 (R. C. L. R. vol. 108).

intending to lay out such new *street, and be signed by him or his duly authorized agent. Every such section shall show [*261 thereon the level of the present surface of the ground above some known fixed datum, the level and rate or rates of inclination of the streets with which it will be connected, and the level of the lowest floors of the intended new buildings."

Section 9 of the Local Government Act, 1858, enacts that "all proceedings, contracts, matters, and things respectively begun or made under any section of the Public Health Act, 1848, repealed by this act, may respectively be proceeded with and enforced as if no such repeal had taken place; and all powers exercised or by-laws made under any section shall continue in force until the new powers and by-laws authorized by this act are brought into operation; and no such repeal shall affect any decree or order of the High Court of Chancery, or of any other court of justice that has been obtained previously to the passing of this act."

It was admitted by the appellant that the respondents had given notices to the local board, and deposited plans of a new street intended to be laid out by them, pursuant to section 72 of the Public Health Act, 1848, some time before the Local Government Act, 1858, came into operation.

The respondents' attorney thereupon objected that the complaint laid by the appellant alleged no offence, inasmuch as the fact of notices and plans having been given, deposited, and accepted in compliance with s. 72 of the Public Health Act, 1848, was not negatived. He contended that the notices given by the respondents to and accepted by the local board prior to the Local Government Act, 1858, was a proceeding, matter, and thing begun or made, within the meaning of section 9 of the Local Government Act, 1858, and might still be carried into execution.

*No attorney appeared on behalf of the appellant, to argue [*262 the question.

The justices, considering that the admission by the appellant that notices had been given and plans deposited and accepted by the local board previous to the operation of the Local Government Act, 1858, was in fact an answer to the case, held the objection to be good, and dismissed the complaint.

The question for the opinion of the court was,—Whether the justices' decision in dismissing the said complaint on the ground aforesaid was or was not right in point of law.

If their decision was right, their order dismissing the said complaint was to stand good; if not, the court were to remit the matter to the justices, in order that they might proceed further therein.

Archibald (with whom was *Lush*, Q. C.), for the appellant.—The case is very imperfectly stated: it does not show when the notice was given by the respondents under the 72d section of the Public Health Act, 1848. Nothing was intended to be saved by the 9th section of the 21 & 22 Vict. c. 98, but what had already been begun; whereas, in truth, the notices and plan mentioned in the case were deposited seven years ago; and the street in question was one of a great number marked out on the plan, only a very small portion of which had been subsequently laid out.

Willoughby, for the respondents.—The simple question is, whether that which the respondents have done was “a matter or thing begun or made under the Public Health Act, 1848, within the meaning of the 9th section of the Local Government Act, 1858.” The 72d section of the former act defines all that the parties intending to lay out any new street were to do; *and all those requirements were in this case duly complied with. It is plain, it is submitted, from the language of the 9th section of the later act that the legislature never intended to interfere with such a case. [BYLES, J.—Would not the respondents have been justified in proceeding upon their notice in the time of the old commissioners?] No doubt they would. The proceeding is in effect an attempt to make the new board, under the 21 & 22 Vict. c. 98, a court of appeal from the old board. The 28th by-law of the Sheerness local board, set out in the case, is in terms prospective only.

Archibald was heard in reply.

ERLE, C. J.—It is enough for us, in order to dispose of this case, to say that nothing is brought before us to show that the decision which the magistrates have come to is wrong in point of law. I am anxious to limit myself to answering the question propounded to us, so that, in case the facts will enable the parties to raise the point intended to be raised in a more formal manner, nothing that passes on this occasion may operate unduly to their prejudice.

The rest of the court concurring,

Judgment for the respondents.

*264] *SAVAGE, Appellant; BROOK, Respondent. Nov. 11.

The 62d section of the Barnsley Improvement Act, 3 G. 4, c. xxv., imposed a penalty for, amongst other things, exposing for sale in any of the streets, &c., of the town any meat, &c., so as to project over or upon any foot or carriageway, &c. The 63d section provided that no person should be subject to any penalty under the act for placing any stall or exposing provisions, &c., for sale, so as such stalls, &c., be placed in such part of the streets, &c., as should be appointed by the commissioners. And the 64th section provided that no person should be subject to any penalty under the act for placing any stall or exposing provisions, &c., for sale in such parts of the streets, &c., as should have been theretofore used for that purpose at the times of the usual fairs and markets within the town, &c.

In the year 1853, a local board of health was constituted in Barnsley under the Public Health Act, 1853 (16 & 17 Vict. c. 24), who, by certain by-laws duly allowed and published, appointed certain places for markets for certain descriptions of goods on market-days, and imposed penalties for the breach thereof:—

Held, that the provisions of the local act did not exempt from such penalties one who violated these by-laws by exposing for sale meat, &c., at a place other than that so appointed by the local board of health,—notwithstanding the spot where such meat, &c., was so exposed for sale was a place where such articles had for a long series of years been sold by him and others.

ON the 8th of June, 1863, George Savage, of Barnsley, in the west riding of Yorkshire, the duly-appointed inspector of markets and fairs, laid an information before a justice of the peace against one Francis Brook, residing at Wakefield, in the said riding, which alleged that “Francis Brook, John Sidebottom, and John Austwick, all of Wakefield, in the said west riding, butchers, on Saturday, the 6th of June instant, at Barnsley, in the said west riding, after the market-place within the said district was opened for public use, did place and

expose for sale certain articles, to wit, butchers' meat, on the May-Day Green, in Barnsley aforesaid, the same not being the place appropriated for the sale of butchers' meat, contrary to the directions of the inspector of the markets, and contrary to the statute and the by-laws of the local board in such case made and provided."

The information and complaint came on for hearing before the justices at a petty session held at Barnsley on the 10th of June last, and by adjournment on the 21st of October, 1863, when the justices dismissed the same; and, the appellant being dissatisfied with their decision, the following case was stated for the opinion of this court pursuant to the 20 & 21 Vict. c. 43:—

*A local act, 3 G. 4, c. xxv., intituled "An Act for lighting, paving, cleansing, watching, and improving the town of Barnsley, in the west riding of the county of York," was passed in 1822. [*265]

By the 62d section a variety of annoyances and nuisances in the streets, lanes, roads, highways, passages, or other public places in the said town were prohibited. The same section provided "that, if any person or persons shall in any of the present or future streets, lanes, roads, highways, passages, or other public places in the said town, expose for sale or sell any horse, ass, pig, sheep, bull, cow, or other beast or cattle (except in any public market or fair), or hang up, place, or expose to sale the carcase of any calf, sheep, swine, cattle, or beast or any part or parts thereof, or any goods, wares, or merchandise whatsoever, or any fruit, vegetables, or garden stuff, or other matter or thing, in or upon or so as to project over or upon any footway or carriage-way, or beyond the line of or on the outside of the window or windows of the house or shop at which the same shall be so hung up or placed or exposed to sale, or so as to obstruct or incommode the passage of any person or carriage,"—any person so offending was rendered subject to a penalty not exceeding 5*l*.

Section 63 of the same act, which is not repealed, is as follows:—
"Provided always and be it further enacted, that no person shall be subject to any penalty by virtue of this act for placing or setting any stalls or standings, or any wagons, carts, or other carriages, in which any provisions, goods, wares, merchandises, articles, or things shall have been brought and be offered for sale, or exposing to sale any such provisions, articles, or things, so as that such wagons, carts, or other carriages, stalls, or standings, articles, or things be placed in such part of the said streets, *lanes, roads, passages, or public places as shall be appointed for that purpose by the said com- [*266]
missioners, with the consent of the owner or owners of the fairs and markets held at, within, or for the said town of Barnsley for the time being, or his or their authorized agent, in writing; due care being taken in all the aforesaid cases to impede or obstruct as little as possible the public streets, lanes, roads, highways, passages, and places within the said town."

Section 64, which is also unrepealed, is as follows:—"Provided also, and be it further enacted, that no person shall be subject to any penalty by virtue of this act for placing or setting any stalls or standings, or exposing to sale any provisions, goods, wares, merchandises, or other articles or things whatsoever in such parts of the several streets, lanes, passages, and public places within the said town as

shall have been heretofore used for that purpose, at the times of the usual fairs and markets within the said town; due care being taken to impede as little as possible the public passage along the same."

Section 74, which is also unrepealed, enacts,—“that the said commissioners shall or may, and they are hereby authorized and empowered, at any time or times, by and with the consent of a majority of the inhabitants of the said town of Barnsley rated to the rates and assessments for carrying this act into execution, assembled in vestry in pursuance of a notice setting forth the purport and intent of such meeting, and published in the several churches in the said town at least ten days before the day of meeting, to contract and agree with the owner or owners of, and any trustees, parties, or persons interested in any other messuages, buildings, lands, grounds, tenements, pickages, stallages, market and fair rents, tolls, dues, duties, free customs, *267] profits, advantages, and rights *belonging, due, or in anywise appertaining to the owner or owners of the fairs and markets within the said town of Barnsley for the time being, or hereditaments whatsoever, situate within the said town, for the absolute purchase thereof, or of any part or parts thereof, which the said commissioners shall think proper and necessary to be purchased for the purposes of this act, at or for such price as shall be mutually agreed upon for the same."

And section 142, which is also unrepealed, provides and enacts,—“that nothing in this act contained shall (except so far as authority is expressly given by this act) extend, or be construed or deemed or taken to extend, to affect, extinguish, defeat, abridge, impeach, annul, prejudice, or destroy the right, title, or interest of the most noble George William Frederick, Duke of Leeds, lord of the manor of Barnsley, or the lord of the manor of Barnsley for the time being, of, in, or to the seignories, rights, royalties, charters, franchises, jurisdictions, rents, services, liberties, privileges, powers, and authorities appendant, appurtenant, incident, or belonging to the said manor of Barnsley, or to any rents, tolls, pickage, stallage, free customs, dues, duties, profits, or advantages belonging, due, or in anywise appertaining to the said Duke of Leeds, owner of the fairs and markets within the said town of Barnsley, or the owner or owners of such fairs and markets for the time being; but that the said Duke of Leeds, lord of the said manor, and the lord of the said manor for the time being, shall (except as in this act expressly excepted) have, hold, use, exercise, take, and enjoy all and every the seignories, rights, royalties, charters, franchises, pre-eminences, jurisdictions, rents, services, powers, authorities, liberties, privileges, advantages, and emoluments whatsoever to the said manor belonging or incident, appendant, *268] appurtenant, or usually *exercised, holden, or enjoyed therewith: and the said Duke of Leeds, owner of the said fairs and markets, and the owner and owners of the said fairs and markets for the time being, shall and may demand, exact, take, and enjoy all such rents, tolls, pickage, stallage, free customs, dues, duties, profits, and advantages, with all powers and remedies for enforcing payment thereof, in such and the like manner and as fully and beneficially to all intents and purposes as if this act had not been passed."

The Duke of Leeds was at the time of the passing of this act the

lord of the manor of Barnsley, and the owner of the markets and fairs in the town of Barnsley which had been customarily held in parts within that town, with the pickages, stallages, market rents, and tolls thereof, and of three pieces of land, one called the Church Field or Michaelmas-Fair Field, in which the Barnsley October fair had usually been held,—the Market Hill,—and the May-Day Green, where fairs had always been held in February and May.

By an ancient charter, dated 1249, the right to hold a market in the town of Barnsley every week, on Wednesday, was granted to the priors and convent of Pontefract; and a market for the sale of butchers' meat and other marketable commodities has been always held on the Market Hill during the day-time on Wednesday; and a like market was also holden there on Saturday evenings, until the butchers commenced to sell their meat on Saturday upon the May-Day Green. They so commenced more than thirty years before the commencement of these proceedings; and since then, without interruption, the sale of butchers' meat and several other marketable commodities upon stalls or standings has taken place on Saturdays upon the May-Day Green; and on Wednesdays also the market generally has been held, not only on the May-Day Green, but also on the Market Hill.

*The butchers placed stalls on the May-Day Green for the purpose aforesaid; and pipes were laid for supplying gas, [*269 and the same was supplied to and paid for by the stall-owners.

Some of the butchers have paid, during the past thirty years, although irregularly, to lessees and others, stallage rent for standing upon the May-Day Green: but the right to collect this stallage has always been disputed.

The commissioners appointed under the said act of 3 G. 4, c. xxv., did not purchase the rights of the lord, but purchased the piece of land called the Market Hill; and in other respects continued to exercise their powers under the act until the year 1853, when the general board of health made a provisional order, which was confirmed by the statute 16 & 17 Vict. c. 24 (called "The Public Health Supplemental Act, 1853, No. 1"), so far as the same was authorized by the Public Health Act. By this order and statute a local board of health was constituted in the town of Barnsley: and it was thereby provided by the respective sections next set out, as follows:—

"7. The parts of the said local act specified in the schedule to this order shall be repealed, except in so far as the same repeal any other act or acts of parliament.

"8. All the powers of the commissioners under the said local act, and those of their officers and servants, shall wholly cease.

"9. Such of the said powers as are granted by the unrepealed parts of the said local act, shall, so far as the same are not repugnant to or inconsistent with the said Public Health Act or this order, or any by-law lawfully made under the said Public Health Act, be transferred to the said local board of health and the officers of the said local board, and shall be *exercised in the same manner as if [*270 such powers had been granted by the said Public Health Act.

"10. The said local board of health shall be the commissioners for executing the unrepealed parts of the said local act.

"11. The provisions (except as aforesaid) of the said Public Health Act may, whenever practicable, be applied to anything which shall arise under the unrepealed parts of the said local act; and such unrepealed parts shall be incorporated with the said Public Health Act, and shall extend to the whole of the said township.

"12. All property and estate whatsoever of the commissioners under the said local act shall be transferred to the said local board of health, and shall be held by them upon the same trusts and for the same purposes as by such commissioners."

And it was also provided that—"17. In the event of the purchase by the said local board, acting as commissioners in the execution of the unrepealed parts of the said local act, of market and fair rights, and other matters and things pertaining thereto, under the 74th section of the said local act, the sections of the Markets and Fairs Clauses Act, 1847,—with respect to the construction of the market or fair and the works connected therewith, except so much thereof as relates to lands taken compulsorily,—and the holding of the market or fair, and the protection thereof,—and slaughter-houses,—and weighing goods and carts,—and stallages, rents, and tolls,—and by-laws,—shall be incorporated with so much of the said local act as remains unrepealed by this order, and with the said Public Health Act as applied to the said township by this order, and any act of parliament confirming the same: and the expression 'the special act,' used in the *271] said sections, shall be construed to mean the 'unrepealed parts' of the said local act and the said Public Health Act so applied; and the expression 'limits of the special act,' used in the same sections, shall be construed to mean the district constituted by this order; and the expression 'the commissioners,' used in the said sections, shall mean the said local board."

The schedule to the said provisional order was as follows:—"The parts of the local act referred to in this order to be repealed, are as follows, that is to say,—the sections numbered respectively, in the copies of the said act printed by the Queen's printers, 1 to 34, 37 to 39, 43 to 60, all inclusive; 61, 62, 65 to 73, 75 to 92, 94 to 96, and 99 to 141, all inclusive; and so much of any unrepealed part of the said act as fixes the amount of any penalty for any offence under the said act, wherever the penalty for such offence is fixed by the Public Health Act or any act hereby incorporated therewith, or by any by-law of the local board of health, at an amount other than that fixed by the said local act."

Under the heading in the Markets and Fairs Clauses Act, 1847, which has reference to the construction of the market or fair, there is a clause (10) of that act which is in the following words,—“Subject to the provisions in this and the special act, and any act incorporated therewith, the undertakers for the purpose of constructing a place for holding the market or fair may execute any of the following works, that is to say,—

“They may enter upon any lands described in the special act or the schedule thereto, or other lands purchased by them or belonging to them, and set out such parts as they think necessary for the purposes of the market or fair, and thereupon from time to time build and maintain such market-places or places for fairs, and such stalls, sheds, pens,

and other buildings or *conveniences for the use of the persons frequenting the market or fair, and for weighing and measuring [*272 goods sold in the market or fair, and for weighing carts, as they may think necessary:—

“They may from time to time on such lands as aforesaid make and maintain all such roads and approaches as they may think necessary for the convenient use of the persons resorting to the market or fair.”

The local board was duly elected, and has since exercised the functions conferred upon them by the Public Health and Local Government Acts; and the property belonging to the commissioners became vested in them. Among other property was the piece of land, containing about 990 yards, above referred to, and termed the Market Hill.

In the month of July, 1860, a resolution was passed at a meeting of owners and rate-payers of the district of the township of Barnsley (being the district of the said local board), that the local board should have power to do the following things, or any of them, within their district,—

“To provide a market-place and construct a market-house and other conveniences for the purpose of holding markets in the said district :

“To provide houses and places for weighing carts :

“To make convenient approaches to such market :

“To provide all such matters and things as may be necessary for the convenient use of such market :

“To purchase or take on lease land, and public or private rights in any market, and tolls, in the said district, and particularly the right to certain land and appurtenances and to certain fares, markets, tolls, and similar franchises, belonging to the trustees of the late Duke of Leeds, for any of the foregoing purposes ; and

“To take stallages, rents, and tolls in respect of the use by any person of such market-house.”

*This resolution was carried upon a poll. [*273

The local board thereupon completed an arrangement which they had been negotiating for the purchase of the rights to the markets and fairs belonging to the Duke of Leeds : and by a conveyance dated the 12th of June, 1861, between the trustees of the will of the late Duke of Leeds and the local board of health of Barnsley, which was executed with the sanction of the Court of Chancery, the said trustees, in consideration of the sum of 2700*l.* paid to them by the said local board, duly conveyed to the said board : “Firstly, all those the markets and fairs, and right and privilege of holding markets and fairs within the township of Barnsley in the parts and places where such fairs and markets have heretofore been customarily held, and in any other public parts and places within the said town wherein the same may be legally held, together with all pickages, stallages, market and fair rents, tolls, duties, free customs, profits, advantages, and rights belonging, due, or appurtenant to such fairs and markets, or to the owner or owners thereof, within the town of Barnsley, and together with the free use and enjoyment of all or any of the streets, roads, and ways within the said town for the purpose of holding such markets and fairs therein, and of collecting and

enforcing and compelling payment of all pickages, stallages, market and fair rents, tolls, duties, and profits for the time being payable or demandable in such markets and fairs, or any of them; and all other franchises, rights, privileges, and liberties in or about or belonging to such right of holding fairs and markets, so far as the said Viscount Nevill, Frederick Acclom Milbank, Thomas Fairfax, Sir James Ferguson, and Joseph Henry Hudson, as trustees of the will of the said William Frederick, late Duke of Leeds, can grant the same,—Secondly, *274] all that *plot, piece, or parcel of land situate in the said township of Barnsley, called or known by the name of the Church Field or Michaelmas-Fair Field, containing four acres, one rood, and twenty-two perches, or thereabouts (subject to all rights of road and other rights affecting the same, and particularly to a certain right of road nine feet wide from a street called St. Mary's Gate to Fair-Field House, formerly sold by the said Duke of Leeds), and which said piece or parcel of land is more particularly described upon the map or plan endorsed on the third skin of these presents, and is therein coloured green,—Thirdly, all that waste or unenclosed land or ground situate in the township of Barnsley aforesaid, called or known by the name of the May-Day Green, and shown upon the said map or plan, together with all and all manner of lawful profits, commodities, privileges, and advantages whatsoever coming, arising, renewing, increasing, or payable for or in respect of all and every the said fairs and markets and every of them hereafter to be holden and kept under or by virtue of these presents for the said town of Barnsley, within the bounds, limits, and precincts of the same,—except and always reserving, nevertheless, unto the said trustees, all coal, ironstone, lead, and other minerals lying and being within and under the said pieces or parcels of land and hereditaments, with powers of winning, working, and getting away the same, as they are entitled to under the Barnsley Enclosure Act, To have and to hold the said markets and fairs, and right and privilege of holding markets and fairs within the said town, together with all pickages, stallages, market and fair rents, tolls, dues, duties, free customs, profits, advantages, and rights, pieces or parcels of land and waste or unenclosed land firstly, secondly, and thirdly hereinbefore particularly described, and expressed to be hereby *275] granted, and other *the premises hereinbefore expressed to be hereby granted and released, or otherwise assured, or intended so to be, unto and to the use of the said local board of health, their successors and assigns, for ever."

As soon as the conveyance was executed and the local board obtained possession, they proceeded to frame by-laws and to settle tables of tolls for the markets and fairs. The by-laws purported to be made and ordained by the local board of health for the district of the township of Barnsley, in the county of York, for the better regulation of the markets and fairs and market-places for the sale of cattle, animals, and provisions, and all other marketable commodities within the said district, pursuant to the powers and provisions contained in The Public Health Act, 1848, The Public Health Supplemental Act, 1853, (No. 1), and The Local Government Act, 1858.

The notices required by the Public Health Act were duly given, and the by-laws were submitted on the 8th of October 1862 to Her

Majesty's principal secretary of state for the home department, who on the 27th of November, 1862, returned the same allowed. Public notice was given that such by-laws and table of tolls had been duly approved by such secretary of state, and that the markets and fairs would be opened on the 11th of April last under the provisions of the Local Government Act, 1858, and that after that day the by-laws would be strictly enforced.

The certificate of two justices required by the 10 & 11 Vict. c. 34, s. 32 (The Markets and Fairs Clauses Act, 1847), was also obtained, certifying that the Corn Exchange or Market House, Market-Hill, May-Day Green, Church Field, and other places to be used for fairs within the said district, were properly completed and fit for public use.

*The 3d and 4th by-laws were as follows:—

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"Appropriation of the open market, Market Hill.

"3. The open market, situate on Market Hill, in Barnsley aforesaid, shall be appropriated as a market for the sale therein, on Wednesdays, of butchers' meat, bacon, pork, cheese, eggs, and butter in the firkin or laid down, flower roots, plants, trees, shrubs, calicoes, cloth, linen, mercery, articles of dress, provisions, coopers' ware, pastry, spices, confectionery, books, nuts, brooms, besoms, and hardware; and on Saturdays the same shall be exclusively appropriated for the sale therein of butchers' meat, bacon, pork, cheese, eggs, and butter in the firkin or laid down."

"Appropriation of the open market, May-Day Green.

"4. The open market situate on May-Day Green, in Barnsley aforesaid, shall be appropriated for a market for the sale therein of horses, cattle of all kinds, calves, sheep, pigs, geese, fruit, vegetables of all sorts, fish, earthenware, potters' ware, glasses, hay, straw, grass, and vetches, medical wares, old metal, images, pictures, cutlery, hardware and smallware, clothing, boots, and shoes: Provided, however, that these several appropriations shall be open to alterations and additions at any time hereafter, as the said local board of health shall find requisite or convenient."

The 6th by-law was as follows:—

"As to articles offered for sale.

"No article shall be offered for sale or sold in any market, or kept or brought into the same for sale, other than such for which the said market or part of any such market shall have been appropriated as hereinbefore set forth. Every person offending against this by-law shall forfeit and pay for the first offence the sum of 5s., for a second offence the sum of 10s., and for every offence subsequent to a second offence the sum of 20s."

*The 12th and 13th by-laws are as follows:—

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"Stalls to be placed on the parts appropriated.

"12. No stall, bench, cart, hand-cart, wheelbarrow, hamper, basket, box, or tub, or other article, shall be placed otherwise than as and where the inspector of the market shall direct; and the several articles brought into the market shall be sold and placed and exposed for sale only at or in such parts of the market as shall be appropriated by the regulations hereinbefore specified for such articles respectively. Every person offending against this by-law shall forfeit and pay for

the first offence the sum of 2s. 6d., for a second offence the sum of 5s., and for any offence subsequent to a second offence, the sum of 10s.

"13. Provided that these by-laws shall not extend or be deemed or construed to extend to prohibit any person from exposing, or offering for sale any marketable commodities in any shop or warehouse not being in one of the said markets, or in his or her dwelling-house, or to subject such person to any penalty for so doing."

The following table of tolls is appended to and forms part of the by-laws made by the local board:—

"Barnsley Local Board of Health.

"Markets and Fairs.

"Stallages, rents, and tolls to be from time to time demanded and taken from any person occupying or using any shop, stand, stall, shed, space of ground, or place in any market-place or market-house appropriated by the said local board of health for the holding therein of markets and fairs, and belonging to the said local board of health, or which they are entitled to use, or bringing therein any cattle, animal, goods, provisions, articles, or things, by the said local board of health under and by virtue of the powers and provisions contained in The *278] Public Health Act, 1848, *The Public Health Supplemental Act, 1853, (No. 1), and the Local Government Act, 1858, and agreed to, adopted, and made by the said local board of health at a meeting of the said board duly convened and held on the 22d of August, 1862.

"Market and Fair Tolls.—Stalls.

	s.	d.
"From the occupier of each butcher's stall on Saturdays, for the use of the party taking only, including gas, water, fixing, removing, and cleansing, per week	3	6
"From the occupier of each butcher's stall on Wednesdays only	1	6
"Ditto, if one gas-light be provided extra	0	6
"From the occupier of each stall for the sale of fish, for each and every superficial foot thereof:		
" If taken by the year	6	6
" If taken by the half-year	3	6
" If taken by the quarter	1	9
" If otherwise taken or occupied, for each market-day or other day in the week, per superficial foot	0	0½
" If one gas-light be provided extra	0	6
"From the occupier of each stall or article used as such for vegetables and fruit on Wednesdays and Saturdays and fair days, eight feet in length and four feet in breadth	0	9
"For the like stalls, when used on any other day in the week	0	4½
"Stalls or articles used as such of greater or less dimensions, in the same proportion; if one gas-light be provided, extra	0	6
"For standage of all goods sold by auction, per superficial foot of the ground covered by the goods	0	1
"For standage of each hawker's cart or wagon, per day	3	6

The markets having thus been opened, and the by-laws duly made, allowed, and published, as above stated, a person named Francis Brook, of Wakefield, butcher, on Saturday, the 6th of June last, *279] after the *market-place had been opened to public use, placed and exposed for sale certain butchers' meat on the May-Day Green, not being the place appropriated for the sale of butchers' meat by the by-laws above referred to, and continued to expose the same for sale notwithstanding the said by-laws, and contrary to the direc-

tion of the local board of health through their officer, namely the inspector of the markets.

The local board of health thereupon caused this information to be laid by George Savage, the inspector of the markets, before the justices, for a penalty for a breach of the by-laws above set forth; and, on the hearing, the defendant contended that the above by-laws,—especially the fourth and sixth,—were invalid and inoperative against him, on the following grounds, namely, that the above-cited 64th section of the local act, 3 G. 4, c. xxv., not having been repealed, no person was liable to a penalty for exposing butchers' meat for sale in the public places in the town of Barnsley theretofore used for that purpose; and that the by-laws prohibiting the sale of butchers' meat on the May-Day Green, and also the by-law setting apart the Market Hill as the only place for the sale of butchers' meat, were not legal.

For the informant, it was contended that section 64 of the above-mentioned local act only referred to penalties under that act, and had no operation in reference to the present penalty, which was incurred under the Public Health and Local Government Acts, for violating a by-law made by the local board of health for the purpose of regulating the use of the markets vested in them by their purchase from the trustees of the Duke of Leeds, and by virtue of the powers contained in clause 9 of the provisional order hereinbefore mentioned, and in the Markets and Fairs Clauses Act, 1847.

*The justices were of opinion that the argument of the defendant was correct, and dismissed the information, subject to the opinion of this court upon the following questions,— [*280

First, whether, in consequence of the 64th section of the local act, 3 G. 4, c. xxv., being unrepealed, the defendant was liable to a penalty for placing and exposing butchers' meat for sale in the May-Day Green, under by-law No. 12,—Secondly, whether the by-law numbered 6 is a good and valid by-law,—Thirdly, whether the by-laws numbered 3 and 4 are good and valid by-laws.

And the judgment of the court was accordingly required upon these questions; it having been agreed that all the by-laws made by the local board, and the whole of the statute 3 G. 4, c. xxv., and the conveyance from the trustees of the Duke of Leeds, with the map or plan thereupon endorsed, not set out in the case, might be referred to, if requisite, as if the same had been made part of the case.

If the court should affirm the determination of the justices, the information was to stand dismissed; but, if they should reverse it, a conviction for the penalty of 2s. 6d. was to be awarded against the defendant; or such further order was to be made in the matter as to the court should seem fit.

Manisty, Q. C., for the appellant, (a) submitted that *it was competent to the local board of health of Barnsley, so soon as they had become owners of the markets there by purchase from the Duke of Leeds, and had provided proper places for holding markets,— [*281

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the several by-laws set out in the case are valid, and that for breaches of them the prescribed penalties may be enforced:

"2. That the 64th section of the 3 G. 4, c. xxv., only refers to penalties imposed under that act, and has no reference or operation as to penalties incurred by breaches of by-laws made by the local board of health under the circumstances stated in the case."

which were not necessarily confined to any particular spot, but might be erected in any convenient spot within the borough, (a)—pursuant to the 50th section of the Local Government Act, 1858 (21 & 22 Vict. c. 98), to make by-laws for their regulation, and to appoint, as they had done here, certain places for the exclusive sale of the several articles to be exposed therein; that, what the local board did was no interference with any prescriptive right of the inhabitants of the borough; and that all that was meant by the 63d and 64th sections of the local act of 3 G. 4, c. xxv., was, that parties should not be held liable to penalties imposed by that act for nuisances committed in the public streets by the exposure for sale of their goods in places where the markets had theretofore usually been held.

Hayes, Serjt. (with whom was *Beresford*), for the respondent. (b)—
 *282] Down to the time of making these *by-laws in 1862, there had been two markets held in Barnsley, the one at Market Hill, the other at May-Day Green. The by-laws which the local board of health have made, are not for regulating these markets, but for abolishing one of them, viz. the May-Day Green market, as respects the sale of butchers' meat there,—which has been held since the year 1249, without any interruption, so far as appears from the case. [BYLES, J.—The whole evidence of title is that contained in the paragraph of the case at p. 268, where it is stated that “a market for the sale of butchers' meat and other marketable commodities has been always held on the Market Hill during the day-time on Wednesday; and a like market was also holden there on Saturday evenings until the butchers commenced to sell their meat on Saturday upon the May-Day Green. *They so commenced more than thirty years before the commencement of these proceedings*; and since then, without interruption, the sale of butchers' meat and several other marketable commodities upon stalls or standings has taken place on Saturdays upon the May-Day Green: and on Wednesday also the market generally has been held, not only on the May-Day Green, but also on the Market Hill.”] The 64th section of the 3 G. 4, c. xxv., which is unrepealed, and which forms part of the special legislation for the township of Barnsley, expressly provides that “no person shall be subject to any penalty by virtue of this act for placing or setting any stalls or standings,
 *288] or *exposing to sale any provisions, goods, wares, merchandises, or other articles or things whatsoever, in such parts of

(a) See *Ellis v. The Mayor, &c., of Bridgnorth*, ante, p. 52.

(b) The points marked for argument on the part of the respondent were as follows:—

“1. That, under the circumstances stated, the respondent cannot be compelled to remove his stall from May-Day Green to Market Hill, and thereby make himself liable to pay tolls or stallage:

“2. That the respondent had acquired a prescriptive right to expose for sale butcher's meat on May-Day Green, and such right was not affected by the by-laws:

“3. That the 64th section of the local act 3 G. 4, c. xxv., being unrepealed and virtually re-enacted by the special act, the respondent is thereby protected from the penalties sought to be imposed:

“4. That the by-laws numbered 3 and 4 are invalid, as being repugnant to the said 64th section, which is incorporated with the special act under the 42d section of the Markets and Fairs Clauses Act, 10 Vict. c. 14:

“5. That by-law No. 6 is invalid, under the 42d section of that act:

“6. That the tolls and payments sought to be enforced against the respondent are invalid, under the 50th section of that act.”

the several streets, &c., and public places within the said town as shall have been heretofore used for that purpose at the times of the usual *fairs and markets* within the said town, due care being taken to impede as little as possible the public passage along the same." This is an attempt to impose upon the respondent a penalty for an act which is expressly made lawful by that clause. [BYLES, J.—That act passed forty years ago, and consequently before the commencement of the thirty years' user upon which you rely.] 'It is to be read as if it were re-enacted in the Local Government Act, 1858. [BYLES, J.—Still, the word "heretofore" in s. 64 of the local act refers to a time prior to 1823.] That would be giving it no operation at all. It is submitted that the words "by virtue of this act," in s. 64, must be taken to mean, by virtue of the special legislation based upon the order of the general board of health, in 1853," confirmed and made of equal force with an act of parliament by the 16 & 17 Vict. c. 24.(a) It incorporates *the unrepealed provisions of the local act, and [*284 makes them speak as from the date of the later act. The 42d section of the Markets and Fairs Clauses Act, 1847, was never intended to confer so extensive a power on the local board as they seek to exercise upon the present occasion. It is not the common-law power to change the locality of the market which they profess to act upon. Their power is, to regulate, not to destroy. It was not the intention of the legislature that legal vested rights should be interfered with by these by-laws.

Manisty, in reply.—The 28th section of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), comes in lieu of the nuisance prevention clause (s. 62) of the 3 G. 4, c. xxv. The local board of health had ample power to make by-laws for regulating the markets within the township of Barnsley, and to impose penalties for any breach of those by-laws. It may be conceded that the board had no right to exclude the respondent from the market; but they had a right to make regulations as to the part of the market to which he and the rest of the persons carrying on his trade should go. Market Hill was the only legal market for the sale of butchers' meat; though by encroachment butchers had for a certain period been accustomed to expose meat for sale on May-Day Green also. There is, however, clearly no prescriptive right which is interfered with by the by-laws in question.

ERLE, C. J.—I am of opinion that the by-laws in question are good, and that a conviction in this case would have been proper. The application of the Public Health Act, 1848, to the town of Barnsley

(a) Sect. 17 of the Barnsley order, in the schedule to that act, provides, that, "in the event of the purchase by the said local board acting as commissioners in the execution of the unrepealed parts of the said local act (3 G. 4, c. xxv.), of market and fair rights, and other matters and things pertaining thereto under the 74th section of the said local act,—the sections of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), with respect to the construction of the market or fair and the works connected therewith, except so much thereof as relates to lands taken compulsorily; and the holding of the market or fair, and the protection thereof; and slaughter-houses; and weighing goods and carts; and stallages, rents, and tolls; and by-laws,—shall be incorporated with so much of the said local act as remains unrepealed by this order, and with the said Public Health Act as applied to the said township by this order, and any act of parliament confirming the same."

*285] was *made in 1853, by a provisional order of the General Board of Health, which derives the authority of an act of parliament from the 16 & 17 Vict. c. 24. This provisional order, which is set out in a schedule to the statute, contains many clauses, by one of which (the 17th) the provisions of the Markets and Fairs Clauses Act, 1847, with respect to the construction of a market in the town of Barnsley, and the making of by-laws for its regulation, are incorporated with the local act 3 G. 4, c. xxv. One of the provisions of the Markets and Fairs Clauses Act, 1847, which is thus incorporated is the 42d, by which it is enacted that the undertakers may from time to time make such by-laws as they think fit, for, amongst other things, "regulating the use of the market-place, and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein or in the immediate approaches thereto," and for "fixing the days, and the hours during each day, on which the market shall be held." And it goes on to provide that the undertakers may from time to time as they shall think fit, repeal or alter any such by-laws, "provided always that such by-laws shall not be repugnant to the laws of that part of the united kingdom where the same are to have effect, or to the provisions of this or the special act, or of any act incorporated therewith." The local board, therefore, are directed to make by-laws for the regulation of the use of the market. In the town of Barnsley, it appears, a market was granted some eight hundred years ago. The whole town of Barnsley was liable to become a market-place: and the usage would show what part of the town was the place so assigned. Originally, it seems, it was a market for the sale of butchers' meat and other marketable commodities, and was held on Wednesday on a place called the Market Hill. In course of

*286] time it came *to be held on Saturday also: and the continuance of the practice for a long series of years might constitute that a lawful market for the town of Barnsley. The town has greatly increased in extent and population: and the number of persons resorting to the market, and the quantity of articles of all descriptions brought to the market, have likewise greatly increased; and for about thirty years May-Day Green has also been used on Saturday evenings as a market-place for the sale of butchers' meat. The local board of health, having under the authority of the 74th section of the local act acquired the market and fair rights in Barnsley, proceeded to erect a market-house and to make regulations for the government of persons resorting thereto for the sale of goods, prescribing the particular places to which they should carry their wares: for instance, the covered market was to be appropriated as follows,—the ground-floor for the sale therein of poultry, fresh butter, and eggs,—the first-floor for the sale therein of oats, wheat, barley, peas and beans in grain, seeds, oil-cake, and tillages. Then, as to the open market on Market Hill, it was to be appropriated as a market for the sale therein on Wednesdays of butchers' meat, bacon, pork, cheese, eggs, and butter in the firkin or "laid down," flower-roots, plants, trees, shrubs, calicoes, cloth, linen, mercery, articles of dress, provisions, coopers' ware, pastry, spices, confectionery, books, nuts, brooms, beoms, and hardware: and on Saturdays the same was to be exclusively appropriated for the sale therein of butchers' meat, bacon, pork, cheese,

eggs, and butter in the firkin or "laid down." The market-place on May-Day Green under the same regulation is dedicated to the sale therein of horses, cattle of all kinds, calves, sheep, pigs, geese, fruit, vegetables of all sorts, fish, earthenware, potters' ware, glasses, hay, straw, grass, and vetches, medical wares, old metal, images, *pictures, cutlery, hardware and smallware, clothing, boots, and shoes. It seems to me that the local board have classified the [*287 various articles to be sold in the respective markets in an extremely reasonable manner, whereby persons resorting to the market for the purpose of selling have convenient accommodation afforded them for the display of their goods, and those coming thereto for the purpose of buying may know where to find each article they may want,—thus making the market more accessible and suitable for the purpose for which markets are established. Such, then, being the rights of the local board, and such being the franchise,—the whole constituting one market, whether held in the market-house, on Market Hill, or on May-Day Green,—the party against whom the complaint was made before the justices was a butcher to whom the Market Hill was pointed out as the place of resort for persons of his trade; and he chose to resort to May-Day Green instead. It seems to me that the by-law was a reasonable one, and that the respondent was guilty of a violation of it, and was liable to the penalty. The difficulty presented before the magistrates, and which we as well as they have felt to be a very grave one, arises from the local act of 3 G. 4, c. xxv., for the management of the town of Barnsley, which gave the usual powers to commissioners as to lighting, watching, and generally preventing nuisances in the town. The 62d section of the act specified a variety of nuisances to be prohibited, and amongst them the exposing goods for sale in the public streets so as to obstruct or incommode the passage of any person or carriage, and imposed a certain penalty on persons offending in this respect. Then comes the 64th section, which enacts that "no person shall be subject to any penalty *by virtue of this act*, for placing or setting any stalls or standings, or *exposing to sale any provisions, &c., in such parts of the several streets, [*288 lanes, passages, and public places within the said town as shall have been heretofore used for that purpose, at the times of the usual fairs and markets within the town, due care being taken to impede as little as possible the public passage along the same." The respondent relies upon this clause as exempting him from penalties under the by-laws, inasmuch as he and all other persons carrying on the trade of butchers had before been used to sell their meat on the market-days at the stalls on May-Day Green. Now, the 64th section of the local act is incorporated with the 16 & 17 Vict. c. 24, under which the Barnsley local board of health is created; and I assume that the 64th section is to be taken as if it had been then for the first time enacted, and that the word "heretofore" is to be read as meaning "before this act." It is material, because at the time of the passing of the 6 G. 4, c. xxv., May-Day Green was not used as a market for the sale of butchers' meat: and we have to say whether the by-law in question is repugnant to that section. It seems to me that what was contemplated by the 64th section was this:—Whereas, by the 62d section, persons exposing goods for sale in the public streets are declared guilty of a

nuisance and liable to a penalty, such penalty shall not be enforced for exposing goods for sale on market-days, if the spot where such exposure for sale takes place shall have been theretofore used for that purpose, and the times are the times of the usual fairs and markets within the town. It saves the use of the spot for marketing purposes, but does not in my judgment save to any individual the right of resorting for those purposes to any particular place where he had before been accustomed to go. I do not think that was at all the meaning *289] of the statute. It contemplated the overflow of the market and its growth beyond the ancient bounds of the market-place, and protected from penalties those who exposed their goods on market-days in the streets and places immediately contiguous to the market-place. Subject to this, the regulations made by the local board are to be applied. That being so, the by-laws in question do not prevent or in any manner interfere with the use of any part of the town of Barnsley which had been used before for market purposes. On the contrary, they take notice of May-Day Green as a place which had been used as a market, and provide that henceforth it shall be devoted to the sale of live stock and the other articles of merchandise before enumerated. The whole of the places which theretofore had been used for the purposes of a market are fairly regulated with reference solely, as it appears to me, to the convenience of the sellers as well as of the public who resort to the market to buy, giving to both the fullest enjoyment of the rights and privileges of a market. If parties choose to come to that part of the market which is exclusively appropriated to certain descriptions of goods, and insist upon exposing for sale there articles which the by-laws require to be exposed for sale in a different part of the market, they violate the regulations,—which, as I have before said, I consider to be very reasonable,—and must bear the penalty. That is the way in which these two sections are in my judgment to be construed. It seems to me that the local board had authority to regulate the mode as well as the time of using the market. It clearly was competent to them to say, as they have said by the fifth by-law, that the market shall not be opened for business until a certain hour. Persons using the market must conform to that regulation; and, if they insist upon coming there at *290] an earlier hour, or upon keeping their stalls open after the hour prescribed for closing, they are clearly guilty of a breach of a reasonable by-law, and are liable to the penalty; and this is totally different from the penalty imposed by the 62d section of the 3 G. 4, c. xxv., for obstructing a public way by exposing goods for sale therein under circumstances which did not bring the parties within the proviso in s. 64.

There is, undoubtedly, very considerable difficulty in bringing one's mind to a clear and satisfactory opinion upon a number of imperfectly recited acts, with some of which certain provisions of others are incorporated, and others of which confer powers to make by-laws, with no very accurately defined limit. If they apparently conflict, all that I can do is to put the best construction upon them which the powers of my mind enable me to do. But if I see a public body exercising in a fair and honest and reasonable manner powers which are conferred upon them for the benefit of the public, I should re

quire a very strong case to be made out to induce me to come to the conclusion that all they have done is to be set aside, and to hold, that, in a case like this, every tradesman who may have used May-Day Green as a market for the sale of butchers' meat for a month or a week or any other time, may, in defiance of the regulations made by the local board, insist upon continuing to resort to the same spot for that purpose. I do not think that would be at all for the convenience of the town of Barnsley; nor do I think it is what the legislature could have contemplated. I am well aware that this question is not entirely confined to persons living in the town of Barnsley, but affects the rights and the interests of all the Queen's subjects who may wish to resort to the market of that town for the purpose of buying or selling. My observations have been particularly directed *to [291 this, that, if I were to hold that these by-laws might be violated with impunity, I should be putting it in the power of any person so disposed to vex and harass the local board by introducing all sorts of confusion and disorder into the markets of the town of Barnsley.

The rest of the court concurring, Judgment for the appellant.

BOOTH v. GAIR. Nov. 13.

Bacon was insured from New York to Liverpool on a policy declaring it to be "warranted free from average, unless general, or the ship be stranded, sunk, or burnt." In the course of the voyage, the vessel encountered bad weather, and the master, for the preservation of the ship and cargo, put into Bermuda, where on survey the vessel was found to be so much damaged that she could only be repaired at an expense exceeding her value when repaired; and she was accordingly sold. Surveys were then held upon the cargo, in order to determine what should be sent on and what sold. Part of the bacon was found too much damaged for re-shipment, and was sold: the rest was re-shipped, and arrived partially damaged at Liverpool.

The assured claimed against the underwriters the difference between the original freight and the increased freight on the portion so carried on, the warehouse-rent incurred at Bermuda, the expense of the surveys on the goods, and the cooerage on those forwarded,—all which charges, except the cooerage, it was admitted upon a case stated for the opinion of the court (who were to draw inferences) that down to the date of the policy in question it was the custom of underwriters to pay, under the name of "particular charges," upon policies in the same form:—

Held, upon the authority of *The Great Indian Peninsular Railway Company v. Saunders*, 1 B. & Sm. 41, 2 B. & Sm. 266, that the underwriters were not liable for any of the above charges; and that the circumstances of the goods being of a perishable nature did not constitute any substantial distinction between the two cases.

THIS was a special case stated for the opinion of the court, without pleadings, pursuant to the Common Law Procedure Act, 1854.

1. The plaintiff is consignee and owner of one hundred and eighteen boxes of bacon, which were shipped on board the ship *Plantagenet* at New York, which vessel was bound for Liverpool.

2. The defendant, on the 15th of January, 1862, insured the said bacon by a policy which contained a clause, that, in case of any loss or misfortune, it should *be lawful to the assured, their factors, [292 servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to that insurance, to the charges whereof the assurers should contribute each

one according to the rate and quantity of his sum assured. The policy was also warranted "free from average, unless general, or the ship be sunk, stranded, or burnt."

3. The Plantagenet sailed from New York on the 11th of January, 1862, in due prosecution of her voyage, but met with heavy gales, and the ship worked and strained very much, and leaked so as to require all hands at the pumps, notwithstanding which the water gained on the pumps; and for the preservation of the ship and cargo she bore away on the 21st to Bermuda as a port of refuge, where she came to anchor on the 1st of February following.

4. When the ship arrived at Bermuda, and under the advice of competent surveyors, the cargo was discharged; and, on a careful examination of the ship, it was found that she was so badly damaged that she could only be repaired at Bermuda at an expense exceeding her value when repaired; and the vessel was accordingly condemned to be sold. Surveys were then held upon the cargo, in order to ascertain its state, and to determine what should be sent on and what should be sold. Parts of it, including a portion of the bacon the subject of this case, were found to be too much damaged for re-shipment, and were sold by the advice of the surveyors, and the remainder (including the remainder of the bacon the subject of this case) was transhipped on board two vessels, the Magnet and the Surprise, for Liverpool, at which port it afterwards arrived.

5. The portion of the bacon so sent on was partially damaged by the perils insured against.

*293] *6. It was admitted that all the above acts were proper under the circumstances. The expense of the transhipment of the part of the bacon so shipped, and the freight of the Magnet and the Surprise exceeded the freight originally agreed to be paid to the Plantagenet by the sum of 1*l.* 12*s.* 7*d.*, which sum the plaintiff had paid.

7. The warehouse-rent at Bermuda for the whole cargo was 24*l.* 14*s.* 8*d.*, a proportion of which, viz. 10*l.* 6*s.* 6*d.*, had been paid by the plaintiff in respect of his bacon, of which amount, part, viz. 6*l.* 16*s.* 6*d.*, was so paid in respect of the part of the said bacon so sent forward by the Magnet and the Surprise, and 3*l.* 10*s.*, the remainder thereof, in respect of the part of the said bacon so sold as aforesaid. The expenses of the surveys held upon the cargo at Bermuda in order to ascertain its state, and to determine what should be sent on and what sold, amounted to the sum of 8*l.* 14*s.*, a proportion of which, viz. the sum of 7*s.*, the plaintiff had paid in respect of the said bacon sent forward by the Magnet and the Surprise as aforesaid, and 2*d.* in respect of the part so sold as aforesaid. The sum of 16*l.* 8*s.* was also paid at Bermuda for cooperage of the goods re-shipped, a proportion of which, viz. the sum of 13*s.*, the plaintiff had paid in respect of the said bacon, of which sum of 13*s.*, part, viz. the sum of 12*s.* 9*d.*, was so paid in respect of the part of the said bacon so sent forward as aforesaid, and 3*d.* in respect of the bacon so sold as aforesaid.

8. It was admitted that there was no constructive total loss of the bacon.

9. The plaintiff sought to recover from the defendant under the said policy the difference between the amount of the freight by the

Plantagenet and the sum total of the freight of the Magnet and Surprise, and the shipping charges, viz. 1*l.* 12*s.* 7*d.*, and also a [*294] proportion of the other three items of expense incurred in respect of the cargo by reason of the vessel putting into Bermuda, and the transhipment of the cargo.

10. It was also admitted, that, down to the date of the policy in this case, it was the custom of underwriters to pay charges on cargo of the nature of the items the subject of this case, except cooperage, under policies in the form of the policy in this case, under the name of "particular charges."

11. The defendant contended, that, under the clause in the margin of the policy, "warranted free from average, unless general, or the ship be stranded, sunk, or burnt," the Plantagenet not having been stranded, sunk, or burnt, and it being further admitted, for the purpose of this case, that none of the above items of claim were general average charges, he was not liable for any of the items sought to be recovered by the plaintiff.

12. The plaintiff contended, that, under the above circumstances, the amounts so claimed by him were not within the warranty by the said clauses, but that the defendant was liable to make them good.

13. The court was to be at liberty to draw inferences of fact in the same way as a jury would: and the questions for their opinion were,—first, whether the before-mentioned four items, or any part and which of them, were within the said warranty clause of the said policy,—secondly, whether the plaintiff was under the circumstances of the case entitled to recover the said four items, or any and which of them, from the defendant.

Quain, for the plaintiff.—The policy is in the ordinary form, with a warranty in the margin "free from average, unless general, or the ship be stranded, sunk, or burnt." If the expenses in question constitute *average loss within that warranty, the plaintiff's claim fails, unless that they are recoverable under the clause enabling [*295] the assured, their factors, servants, or assigns, "to sue, labour, and travel for, in, or about the defence, safeguard, and recovery of the said goods and merchandises, or ship, or any part thereof," &c. "This clause," says Mr. Arnould (1 Arn. on Sh. 31, 2d edit.), "was introduced to obviate a notion which appears at one time to have prevailed, that, if the assured, after a loss which threatened the total destruction of the property insured, were, either by himself or his agents, to take active measures for its recovery or restoration, he would thereby lose the right to abandon which he might otherwise have exercised. The object of this clause, therefore, is, to permit the assured in such cases to take every measure for the recovery of the property, without waiving his right of abandonment, and also to bind the underwriters to contribute, in proportion to the amount of their several subscriptions, to reimburse the assured for the expenses which he may thereby have incurred." The case which gave rise to this question is that of *The Great Indian Peninsular Railway Company v. Saunders*, 1 Best & Smith 41 (E. C. L. R. vol. 101), in error, 2 Best & Smith 266 (E. C. L. R. vol. 110), where the Court of Queen's Bench, and afterwards the court of error, held, that, where goods are insured by a policy of marine insurance in the ordinary form, the expression "warranted free

from particular average" is not confined to losses arising from injury to or deterioration of the goods themselves, but is equivalent to a stipulation against total loss and general average only, and consequently includes expenses incurred in relation to the goods. That case, it is submitted, does not decide this. The circumstances there were peculiar. The vessel having become disabled, and incapable of repair, the goods (iron rails) were sent back to their port of departure, *296] and there taken possession of by the plaintiffs, and re-shipped undamaged on board other vessels, and ultimately arrived in safety at their destination. Here, however, the vessel put into a port of refuge in the course of the voyage, and the expenses now sought to be recovered were incurred in unloading the cargo and transshipping such of it as was capable of being carried on. Erle, C. J., in delivering the judgment of the court of error, says: "It is certain that the plaintiffs cannot recover here as for a total loss of the goods, seeing that the goods were restored to them in specie, and forwarded by them to their place of destination, where, so far as any sea-damage is concerned, they may have received full value for them. But Mr. James ably argues that the plaintiffs are entitled to recover this money, not as compensation for loss of the goods within the general language of the policy, but as the expense of forwarding them to their destination in other vessels, under what has been called 'the labour and travel clause,' which empowers the assured to sue, labour, and travel to save the thing assured from impending loss. The substantial ground, however, on which I decide this case, is entirely beside his able argument. The expenses that can be recovered under the suing, labouring, and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety: and the question is, were these expenses incurred to prevent a total loss? Had the owners a right, *when the goods were given into their possession*, to turn the transaction into a total loss? Certainly not: for they had the goods in specie, and consequently that 825*l.* 11*s.* 7*d.* had no reference to suing, labouring, or travelling in order to prevent such a loss." There was no *297] peril of loss impending there at the time the shippers took possession of the rails. But here the goods were of a perishable nature. When landed at Bermuda, it was found that a large portion of the cargo, including a portion of the bacon the subject of this case, could not profitably be carried on, and it was accordingly sold; the rest, though partially damaged, being sent on to its destination. It must, since the case of *Ralli v. Janson*, 6 Ellis & B. 422 (E. C. L. R. vol. 88), be conceded that there cannot be a constructive total loss of part of the subject of insurance under such a policy as this; though, if there had been here a total loss of the part sent on, there would have been a total loss of the whole. The expenses claimed under the suing and labouring clause must, no doubt, be such as are incurred in protecting the underwriters from an impending peril for which they would be responsible under the policy. If, therefore, a total loss was possible before the arrival of the goods at their destination, the expenses in question were properly incurred in forwarding them. The defendant must contend that the risk was over at Bermuda. That, however, is not so: the master was bound to tranship and send the

goods on. In Phillips on Insurance, vol. 2, p. 464, § 1777, this case is put:—"Suppose the case of an impending total loss of articles insured free of average, and expenses incurred to avert it,—are these expenses within the exception, and to be borne by the assured? or are the underwriters liable for them, on the ground that they were incurred to prevent a total loss for which they would have been liable? In the case of hides insured free of average, and sunk near Nieu Diep, the assured claimed reimbursement of the expense of recovering the hides, under the clause authorizing him to sue, labour, and travel for the safety of the property at the expense of the underwriters. The underwriters were held not to be liable in that case, on the ground that they were not liable for a *total loss of a part [*298 of the hides insured, this being the only total loss that was impending in that case, as above stated. But Mr. Justice Livingston, in giving the opinion of the Supreme Court of the United States, said,—'The parties certainly meant to apply this clause only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. The underwriters not being answerable for the principal [impending] loss, cannot be so for the expenses in recovering the property : ' *Biays v. The Chesapeake Insurance Company*, 7 Cranch 415. This distinctly implies, that, if a total loss of the whole subject insured had been impending, and the expenses had been incurred to avert it, the underwriters would have been liable. But the case is not a positive, direct authority to this point. Mr. Benecke says,—*Princ. of Indem. in Ins.* 8th London edit. of 1824, p. 380,—'As by the salvage of goods insured free of particular average, from shipwreck, &c., a total loss is prevented, which would have fallen upon the underwriter, it seems obvious that the salvage charges must be borne by the underwriter, although the degree of average sustained by the goods has no influence upon him. In a similar manner, when a cargo of corn, &c., arrives damaged at an intermediate port, the charges not only of warehousing, but also of drying and preserving the corn, must fall upon the underwriter, because thereby prevented becoming a total loss at his charge.'" [BYLES, J.—Suppose a cargo of a 1000 ton ship, the ship being disabled in the course of the voyage, were transhipped into two vessels of 500 tons each, and one of the two was totally lost,—would that be a total loss of the half?] Under such a policy as this, it is submitted, it would. It will be contended on the other side that the suing and labouring clause cannot apply unless the goods are in peril of perishing totally *at the very time the expenses are incurred. That, [*299 however, is a fallacy. In Phillips on Insurance, § 1774, it is said: "The exception of loss, like the other provisions of the policy, has reference to the amount at risk at the time of the loss, whether it be more or less than that at risk before or afterwards. Lord Kenyon acquiesced in this rule applied to the part of the full cargo which had been taken on board when the loss occurred: *Rohl v. Parr*, 1 Esp. N. P. C. 445. So, after a part of the cargo had been landed, the exception of loss under 5 per cent. was held, in Maryland, to apply to the amount still remaining at risk: *The Maryland Insurance Company v. Bealey*, 9 Gill & Johnson 337. It has been remarked that a total loss of a memorandum article insured free from partial loss cannot take

seuttle a ship if necessary, and regulations as to fire and light,—none of which are available for vessels whilst lying in the river, though equally available to the graving-dock adjoining the Victoria Docks. There was also evidence that the vessel's detention in the river was longer than was necessary for the replacing of her paddles and paddle-wheels: and it was surmised that there was no intention on the part of her owners to take her back to the Victoria Docks, as she had been taken up for the conveyance of French troops to Mexico.

On the part of the plaintiff it was proved that it was a usual thing to remove the paddles of large steamers, in order to enable them to go into dry-docks, none being wide enough at the entrance to receive *307] them without so doing; and witnesses were called who stated that the time employed in restoring them in this instance was not unreasonable, and that it could be done at a very much less expense at the place where the Indian Empire was moored in the river than in the Victoria Docks. Officers from some of the principal fire-insurance offices in London were also called, who stated that they considered the risk from fire to be greater in a crowded dock than in the Thames, and that there was no difference in their premiums.

The jury having returned a verdict for the plaintiff for the amount claimed,

Lush, Q. C., on a former day in this term, obtained a rule nisi to enter a nonsuit, on the ground that, upon the true construction of the policy, the ship was not covered at the time of the loss,—the court to be at liberty to deal with the evidence as they might deem it admissible or otherwise. He submitted that the essence of the policy was, that the vessel should during the whole time the risk attached be lying in the Victoria Docks or in a dry-dock: and that the defendants never consented to undertake the risk sought to be imposed upon them by the plaintiff, which from the circumstances proved at the trial was very much greater than any that the vessel could run if she had remained in the Victoria Docks.

Bovill, Q. C., and *Watkin Williams*, on a subsequent day showed cause.—The liberty to go into dry-dock was clearly not confined to the graving-dock adjoining the Victoria Docks. If that had been intended, the policy would have stated so in terms. It was found to be not wide enough to receive this vessel. Lungley's dry-dock was the only one within a convenient distance which would accommodate *308] her; and to that she accordingly went. The evidence showed that it was the invariable custom when large steam vessels are docked to remove the lower part of their paddle-wheels; and it was also proved that it was the usual course to replace them at moorings in the river near to the dock; and that, in this instance, the expense of so doing would have been greatly enhanced if the vessel had been taken into the Victoria Docks for that purpose. It being lawful, then, for the vessel to go to a dry-dock out of the Victoria Docks, it follows that the policy protected her in going to and returning from such dry-dock, and during the time necessarily and reasonably employed in the transit.

Lush, Q. C., *Karslake, Q. C.*, and *Sir G. Honyman*, in support of the rule.—The defendants did not by this policy consent to undertake any river risk. The insurance is confined to the ship whilst lying in

the Victoria Docks or in the graving-dock adjoining. Assuming that she had permission to go out of the Victoria Docks to a dry-dock elsewhere, the risk was at all events confined to the period of her stay in the dry-dock and to the time necessarily consumed in going to and returning from such dry-dock. And she was bound to return to the Victoria Docks to get her paddle-wheels replaced, and could not lawfully remain in the river for that purpose at the risk of the defendants. These are the three propositions upon which the defendants rely to absolve them from liability upon this policy.

Reading the policy with the knowledge (which all parties must be assumed to have had,—*Burges v. Wickham*, 33 Law J., Q. B. 17) that there was a graving-dock adjoining and for all practical purposes forming part of the Victoria Docks, and which neither party knew to be of capacity insufficient to admit this vessel, *the necessary [*309 inference is, that that was the dry dock contemplated; for, it is obvious that the object of examining and repairing the ship's bottom would be equally well attained in a pontoon-dock as in an ordinary dry-dock. [*Bovill*, Q. C.—There was no evidence that either the plaintiff or the company knew that there was a graving-dock connected or communicating with the Victoria Docks.] It is a fact as notorious to all persons using the Victoria Docks as is the existence of the river Thames. The limited liberty reserved to the owners of the vessel to light her boiler-fires *once or twice* during the currency of the policy, excludes the notion that she was to have her steam up to enable her to go out to a dry-dock elsewhere. If she was to go out at all, she might go to any dry-dock in the United Kingdom. The plaintiff resided at Hull. Was it intended that the vessel should go there to be docked? Every form of marine policy includes fire as one of the perils insured against. Under this policy, the plaintiff would not have been protected against damage from collision or any other sea peril: and, the common marine policy covering accidents from fire, this policy would be wholly unnecessary upon such a construction. [*ERLE*, C. J.—The exclusion of the lighting of her fires for the purpose of getting up steam for a sea voyage to get to a convenient dry-dock, still leaves it compatible with the language of the policy that liberty was reserved to the owner to take the vessel to any dry-dock in the Thames.] The only risks contemplated were dock risks. The language of the policy excludes river navigation quite as much as sea navigation. Collision is a risk which is perhaps more imminent in the river than at sea. The evidence showed the great disparity of risk from fire in the Victoria Docks and out. In the docks, a large and efficient staff of watchmen, firemen, police, and *carpenters, is always at hand to prevent or to extinguish con- [*810 flagrations. These precautions and the appliances which are available in the Victoria Docks do not and cannot exist in the Thames. Besides all these, there are most stringent regulations as to fires and lights on board vessels in the docks, which are most rigidly enforced. These matters are most important, and are all taken into account in estimating the risk to be undertaken, and ascertaining the amount of premium to be charged. The vessel might and ought to have been towed back to the Victoria Docks for the purpose of having her paddle-wheels replaced there. The only reason assigned by the

plaintiff for not having done so, was, that such a course would have been attended with increased expense, and that it was usual to do this in the river. But the course of business as to vessels not insured under policies of this sort can have no application to the existing state of things here. It may be that the time consumed in restoring the paddle-wheels in the river was not unreasonable or excessive. But it is submitted, that, if the vessel was at liberty to quit the Victoria Docks at all, she was only protected during the time employed in her transit to and from and in her stay at the dry-dock, and that she at all events was not protected while in the river for an unnecessary time for those purposes. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court: (a)—

This was an action on a policy by which the ship was insured against loss by fire during three months. The ship was described to be lying in the Victoria Docks, with liberty to go into dry-dock, and *311] to light her *boiler-fires once or twice. She was burnt within the three months: and the question before us has been, whether, at the time she was burnt, she was covered by that policy.

The circumstances which existed at the time the policy was made relative to its construction, and the circumstances attending the loss relative to the application of that construction to the loss, appeared to be as follows:—The ship was lying in the Victoria Docks, and was to be repaired in a dry-dock. The Thames Graving Dock, in which ships were lifted by pontoons, so as to be dry, was adjoining to the Victoria Docks: but the width of this ship prevented her from going into this pontoon-dock. Lungley's dry-dock, distant about two miles up the Thames from the Victoria Docks, was the nearest that could receive the ship conveniently; and, for the purpose of entering there, it was necessary to remove the lower half of the paddle-wheels. This was done in the Victoria Docks; and the parts of the wheels were deposited in a barge there, and the ship was towed up to Lungley's dock, and the necessary repairs were nearly completed there in the course of two months. Then the ship was towed down to the government buoy off Deptford, within six or seven hundred yards of the Victoria Docks, and moored there for the purpose of having the parts of the paddle-wheels replaced there. The utmost despatch was used in performing this work; and it was nearly completed in ten days. While this was being done, other work was in progress in order to make the ship fit for sea; but there was no delay on this account, and nothing turned on this work. Then, the ship was burnt at her moorings.

The evidence showed that it was usual with the great ship-builders in the Thames for ships of great width which had taken off the half *312] of their paddle-wheels *for the purpose of going into dry-docks, to lie in the Thames after coming out, while the parts of the paddle-wheels were being replaced; and that the mooring of the plaintiff's ship in the river while this process was performed was according to the course usually followed by them in respect of ships whose paddle-wheels had been in like manner and for the same purpose removed. The evidence further showed that the plaintiff's ship might have been taken back into the Victoria Docks without being moored

(a) The case was argued before Erle, C. J., Williams, J., Byles, J., and Keating, J.

in the Thames, and that the paddle-wheels might have been replaced in those docks, but that the expense of the work in the docks would have been four times as great as it was in the river.

It was said that the work could be more conveniently performed in the Thames than in the docks: but this was not explained to have any meaning beyond the expense.

The evidence further showed that in the Victoria Docks there were very careful precautions to prevent damage by fire,—watchmen at all hours, a numerous fire-brigade always ready, policemen and other servants of the company trained to the use of fire-engines, and carpenters ready to scuttle a ship on fire, together with an ample water supply from stand-pipes in many places; while, in the river, it was said that there were only three floating-engines placed at considerable distances from each other, and that nearly an hour elapsed between the breaking out of the fire and the arrival of the first of these engines.

There was evidence, that, in offices of great importance, such as the Sun and the Phoenix, the premium was the same whether the ship lay in the river or a dock. But, in these offices, the same rate had been continued from a far distant time; and the defendants objected, with good reason, as we think, that their *rights under this contract were not to be affected by the rights of parties under other [*313 contracts with other companies.

These being the facts, the defendants contended that the ship was not covered by the policy at the time of the loss, on three grounds,—first, because the ship was not lying in the Victoria Docks, or in the dry-dock adjoining thereto,—secondly, because the ship was not in any dock,—thirdly, because the ship was not in a dock nor in transit from a dock to a dock within the meaning of the policy.

As to the first and second grounds, the defendants contended that the words “lying in the Victoria Docks, with liberty to go into dry-dock,” confined the risk either to the Victoria Docks and the dry-dock adjoining thereto, or to the Victoria Docks and some dry-dock, and excluded the risk in the transit from one dock to another. But, in respect of these grounds, we think that the defendants failed.

As to the first ground, the words of the policy do not express that the liberty is confined to any particular dry-dock: and, although it is probable that both parties expected that the pontoon-dock would be used, and neither party knew that the relative admeasurements of the ship and that dock would prevent the adoption of that course; still effect is to be given to the words in their ordinary meaning; and the liberty to go into dry-dock is unrestricted in expression. If the defendants intend to confine the liberty to the pontoon-dock only, they must express their intention more clearly.

As to the second ground, if the plaintiff had liberty to resort to any convenient dry-dock, we think the policy covered the ship while the plaintiff used the liberty so given to him thereby. The description is in the nature of a condition: the defendants insure for *three months, provided the ship is in the situation mentioned [*314 in the policy, that is, in either dock or in the necessary passage from the one to the other.

We are aware, that, under this construction, the plaintiff would be

uninsured as to all risk from collision or the like in the river during transit, and that the defendants would take an undefined liability in the river if the plaintiff might choose a dry-dock at an undefined distance from the Victoria Docks. But, notwithstanding these considerations, we are brought to the construction above stated, and decide against the defendants on the first two grounds on which they relied.

As to the third ground above stated, we think that the defendants are entitled to succeed. We think that the ship was not in a dock, nor in transit from a dock to a dock within the meaning of the policy. We consider that the risk contemplated by both parties was substantially the risk of fire in a dock: and, although the defendants are held, by implication, to have undertaken so much risk in the river as was essential for the exercise of the liberty of transit from dock to dock; yet this risk in the river is limited to that transit, and does not in our judgment extend to any time during which the ship stopped in the river not for the purpose of that transit. A few hours were all that would have been required for that purpose. The delay of ten days was for the purpose of replacing the paddle-wheels; and there was no proof that they could not have been replaced as well for the ship, although with more expense, in the docks where they were taken off and were left till the ship returned. The risk in the river appears much greater than in the docks, by reason of the absence of many appliances to secure against fire which were available in the docks.

*315] The plaintiff placed much reliance on the fact above *stated, that it was usual with the great ship-builders, after repairing such ships as the plaintiff's, to replace the paddle-wheels in the river. But the question here does not depend on the course of business usual with ship-builders, but upon the contract of these parties. If a ship is prepared for sea in the dock of a ship-builder in all respects except the paddle-wheels, the fixing of which is of necessity postponed in order that the ship may pass out of the dock, it might well be the best and cheapest course for the ship to lie at a convenient place in the river to receive those wheels, and then proceed on her voyage. Time and money would probably be wasted by sending her into another dock. But, under this contract, the insurance is confined by its express terms to the docks: and, though it is extended by implication to the necessary passage from one dock to the other, there is no implication that it should be made to extend to lying in the river for any purpose of repair. The paddle-wheels were not essential for the purpose of moving the ship into the docks. The same power which brought her to her moorings could have taken her on to the docks. According to our construction, the ship was not covered unless she passed directly from the one dock to the other. She did not so pass, but was delayed ten days: and this delay was not owing to any cause connected with the passage. It follows that during those ten days the defendants were not liable.

The rule, therefore, for entering a verdict for the defendants, or a nonsuit, must be made absolute. Rule absolute for a nonsuit.

*ROSEWARNE v. BILLING. Nov. 19. [*316

It is no answer to an action for money paid at the request of the defendant, to plead that the money was paid in respect of losses on time bargains for mining shares which the plaintiff had made as broker for the defendant with third persons.

THIS was an action for money paid by the plaintiff for the defendant at his request, and for money found due on accounts stated.

Second plea,—that the plaintiff was and is a mining share agent, and that the defendant retained and employed the plaintiff as such agent, after the passing and coming into operation of a certain act of parliament passed in the session of parliament held in the eighth and ninth years of her present Majesty, intituled "An act to amend the law concerning games and wagers" (8 & 9 Vict. 109), to make and enter into on behalf of the defendant, and the plaintiff then in pursuance thereof made and entered into for the defendant, with certain persons whose names were to the defendant unknown, certain contracts by way of gaming and wagering, contrary to the form of the said statute, that is to say, certain wagering contracts under the semblance of pretended sales to the defendant by such persons respecting the market-price and value of certain shares in a certain mine called the Wheal Harriet on certain days then to come, whereby, under pretence of contracts, the said plaintiff agreed with such persons, being the persons with whom the plaintiff so contracted for the defendant, that, if the price and value of the said shares should be lower on the said future day than on the respective days when the said wagering contracts were respectively made as in that plea was mentioned, he the defendant should receive from the said persons the amount of the difference between the value of the said shares respectively on the several days when the same wagering contracts were respectively made, and the market value on the *said future [*317 days; and, if the price and value thereof should be higher on the said future days than on the respective days when the said wagering contracts were respectively made as aforesaid, the defendant should pay to the said persons respectively the amount of the difference between the value thereof on the said days on which the said wagering contracts respectively were made as aforesaid and the market value thereof on the said future days: that it never was intended that any shares should be actually bought by the defendant or sold or delivered by such persons in pursuance of the said wagering contracts as aforesaid or otherwise, *as he the plaintiff always well knew*; but that such differences alone should be received or paid by the defendant as aforesaid: that the money so paid by the plaintiff was paid in settling and discharging differences which had become payable to the said persons upon the said wagers and contracts so made by the plaintiff as such agent as in the plea aforesaid, he the plaintiff having as such mining share agent, and according to the custom among mining share agents, made the said wagers and contracts in his the plaintiff's own name as a principal, without disclosing the name of the said defendant: and that the said accounts were stated by the defendant with the plaintiff of and concerning the said money so paid as aforesaid, and not otherwise.

The plaintiff demurred to this plea, the ground stated in the margin being, "that the said contracts are not illegal, and that the said plea does not aver that the defendant did not request the plaintiff to pay the money claimed." Joinder.

H. J. Hodgson, in support of the demurrer.(a)—The *plea
 *318] attempts to raise a defence to this action for money paid, on the ground that the money was paid in respect of time-bargains, which are declared null and void by the 18th section of the 8 & 9 Vict. c. 109; but it does not traverse the allegation that the money was paid *at the request of the defendant*, and therefore the defendant must contend that the contracts in respect of which the money was paid were *illegal*. There is a material distinction between a contract which is simply void, and one which is declared to be illegal: *Gye v. Felton*, 4 Taunt. 876. It is not, therefore, any answer to this action to say that the contracts in respect of which the money was paid were void and incapable of being enforced as between the parties to them. In *Jessopp v. Lutwyche*, 10 Exch. 614, to a declaration for money paid and on accounts stated, the defendant pleaded that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between the plaintiff and the defendant by way of gaming upon the market-price of shares; and it was held, on demurrer, that the plea was bad. Parke, B., in the course of the argument, said,—“The plea does not negative the fact of a third
 *319] party having won the money, and that the *defendant requested the plaintiff to pay the amount over to him. The plea, therefore, is consistent with a state of facts which entitles the plaintiff to recover:” and in giving judgment he said: “It is consistent with the plea that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence.” In *Fitch v. Jones*, 5 Ellis & B. 238 (E. C. L. R. vol. 85), to an action on a promissory note the defendant pleaded that he made the note and delivered it to the endorser in payment of a bet on the amount of hop-duty, and that the plaintiff took it without value. At the trial it was proved that the note was made and given to the endorser for the bet: and the judge left it to the jury to say whether there was value for the endorsement, telling them that the burthen lay on the defendant to prove that there was none. It was held that this was no misdirection; for that, though proof that a negotiable instrument was affected with fraud or illegality in the hands of a previous holder raises a presumption that he would endorse it away to an agent without value, and consequently calls on the plaintiff for proof that he gave value, the presumption does not arise when the previous holder merely held without consideration;

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the plea does not show that the said contracts alleged by the plea to have been made by the plaintiff as the defendant's agent with divers persons, were illegal as alleged:

“2. That the plea does not allege that it was agreed between the plaintiff and the defendant that shares should not be actually bought by the defendant, or sold or delivered by the said persons, in pursuance of the said contracts:

“3. That the plea admits that the money paid by the plaintiff was paid in settling and discharging differences which had become payable to the said persons under the said contracts, but does not deny the allegation in the declaration that the same was paid by the plaintiff at the defendant's request.”

and that a bet, though *void*, and therefore no consideration, was not *illegal*, so as to raise a presumption that the endorsement was without value. "It is clear," says Lord Campbell, "that, when there is illegality or fraud shown in a previous holder, a presumption that there is no consideration for the endorsement does arise; for, the person who is guilty of illegality or fraud, and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him. It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen *of proof that there was no consideration lies, has by [320 proving fraud or illegality in the former holder raised a *prima* presumption that the plaintiff is agent for the holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without any illegality or fraud." [ERLE, C. J.—There is no illegality in betting on a race; but the winner cannot sue. *Jessopp v. Lutwyche* seems strongly in the plaintiff's favour; there is no distinction between the two cases, save that there the wagering contracts were made between the plaintiff and the defendant, and here between the plaintiff and third persons for the defendant. WILLIAMS, J.—This plea is hardly consistent with the suggestion in *Jessopp v. Lutwyche*, that the money may have been paid at the defendant's request after the transactions were over. ERLE, C. J.—Whether the request to pay was before or after the loss was ascertained, it must have the same obligatory force. *Knight v. Cambers*, 15 C. B. 562 (E. C. L. R. vol. 80), is exactly the same as *Jessopp v. Lutwyche*.(a) It was there held that it is no answer to an action for money paid by the plaintiff for the defendant's use, at his request, that the money was paid in respect of losses on wagering contracts made void by the 8 & 9 Vict. c. 109, s. 18. Maule, J., says: "Assuming the original contracts to have been void, there is nothing to prevent the plaintiff from recovering money afterwards paid by him at the defendant's request."] These authorities show that the plea is clearly bad.

Lopes, contrà.(b)—It may be conceded that a plea *that the money which is sought to be recovered was paid upon a con- [321 tract which was merely void, would afford no answer if the money was paid at the defendant's request. The plea in the present case, however, is not like those in *Knight v. Cambers* and *Jessopp v. Lutwyche*: it states not merely that the money was won upon a void contract, but that it was so won *to the knowledge of the plaintiff*. The 18th section of the 8 & 9 Vict. c. 109 enacts that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void:" and it goes on to enact "that no suit shall be brought or maintained in any court of law or equity for

(a) *Jessopp v. Lutwyche* was decided on the 5th of December, 1854; *Knight v. Cambers* on the 23d of January, 1855. And see *Knight v. Fitch*, 15 C. B. 566 (E. C. L. R. vol. 80).

(b) The points marked for argument on the part of the defendant were as follows:—

"1. That the money paid by the plaintiff on behalf of the defendant, being alleged in the second plea to have been paid on a contract which the plaintiff knew to be void, was money paid by the plaintiff in his own wrong:

"2. That this being substantially a suit to recover a sum of money alleged to be won upon a wager, is an action which cannot be brought or maintained."

recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." What is the subject of this action? Why, the money won by the third person upon the illegal bargains made for him by the plaintiff. If such an action as this may be maintained, the enactment of the gaming act may always be evaded. [ERLE, C. J.—It is quite clear that no action will lie to recover differences upon time-bargains. but the cases referred to are express that money paid at the request of the defendant, though for the purpose of paying money so won, may be recovered.] Neither in *Jessopp v. Lutwyche* nor in *Knight *322 v. Cambers* was there any allegation in the plea that the plaintiff was a party to the illegal contracts. [ERLE, C. J.—The judgment in both cases is wholly beside that.]

Hodgson was not called upon to reply.

ERLE, C. J.—I am of opinion that our judgment upon this demurrer must be for the plaintiff. He sues the defendant for money which he alleges he paid for the defendant at his request. The answer the defendant sets up, is, that the money became due by reason of certain wagering contracts made by the plaintiff for the defendant with certain other persons since the passing of the 8 & 9 Vict. c. 109. Now, the law as to gaming contracts, is, that all such contracts are null and void, and no action can be maintained upon them. But they are not therefore illegal. The parties making them are not liable to any actions or to any penalties. Here, the plaintiff paid the differences according to the result, and at the defendant's request. I am clearly of opinion, that, if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid. In *Jessopp v. Lutwyche* and *Knight v. Cambers*, the Court of Exchequer and this court both say that the plaintiff was entitled to judgment on the ground that the money was alleged to have been paid at the request of the defendant, and that there was nothing to show that there was any illegality. Those cases are in point to show this to be a bad plea. I should incline to think, that, if one requests another to make a wagering contract on his account and pay the loss if loss happens, that would be a continuing request to pay until revoked. If the party were a broker who by the usage of the share-market was bound in all events to pay, it might be a question whether the principal could be allowed to rescind. It will be time enough, however, *823] to decide that question whenever it shall arise. For the determination of the matter in hand, it is sufficient to say that there is nothing upon the face of this plea to exclude the notion of a subsequent request to pay.

WILLIAMS, J.—I am also of opinion that this is a bad plea. It is impossible to distinguish it upon any solid ground from the pleas which were held bad by the Court of Exchequer in *Jessopp v. Lutwyche*, 10 Exch. 614, and by this court in *Knight v. Cambers*, 15 C. B. 562 (E. C. L. R. vol. 80). In this plea certainly it is alleged that the money so paid by the plaintiff was paid in settling the differences which had become payable to the persons with whom the plaintiff made the wagering contracts, he the plaintiff having as such mining share agent, and according to the custom among mining share agents,

made the wagers in his own name as a principal, without disclosing the name of the defendant: but I do not think that at all differs the case from those to which I have alluded. It is quite consistent with this plea that the plaintiff, having made the contracts in his own name, and being by force of the statute able to resist payment of the money, might have been minded to resist but for the defendant's request to him to pay. There is nothing in the plea to negative the suggestion that the payment was made after the loss at the defendant's request; and, if so, the defendant is clearly liable to repay it.

KEATING, J.—I am of the same opinion. The plea is perfectly consistent with the plaintiff's having paid the money at the request of the defendant, though both parties knew at the time that the contracts in respect of which the payments were made could not be enforced.

Judgment for the plaintiff.

***SHAND and Another v. JOHN GRANT and ROBERT GRANT. Nov. 18. [*324**

Certain bales of cotton were consigned by merchants at Madras to London for the account of their correspondents, the plaintiffs, who were merchants at Liverpool, under bills of lading having in the margin, pursuant to the course of business at Madras, a note of the measurement and the amount of freight. On the ship's arrival, the plaintiffs' brokers sent the cotton to a wharf with a copy of the bills of lading, another copy of the bills of lading being forwarded to the plaintiffs. According to the ordinary practice, the wharfinger, on receiving the cotton, measured it, and sent a note of the measurement to the defendants, who were the ship's brokers (*one of them also being the owner*). The defendants as brokers made out a freight-note, adopting the measurement from the wharfinger's note, which in consequence of the swelling of the bales on the voyage was considerably more than the Madras measurement in the margin of the bills of lading. The freight-note so made out was sent by the defendants to the plaintiffs' brokers, who, assuming it to be correct, paid the amount, and received credit for it in their account with their principals; and the defendants settled the ship's accounts upon the supposition that all was right. The plaintiffs, on balancing their accounts with the Madras house at the end of the following year, discovered for the first time that they had overpaid the defendants to the extent of 88*l.* 8*s.* 3*d.*, and brought an action to recover it back:—

Held, that, the money having been paid under a mistake of fact, the plaintiffs were entitled to recover it back from the owner of the ship, but not as against the two defendants as ship's brokers, who had settled accounts with the owner in the bona fide belief that the payment had been rightly made.

THIS was an action brought by the plaintiffs, merchants at Liverpool, to recover back from the defendants, who were ship-brokers in London, a sum of 88*l.* 8*s.* 3*d.* which was received by them in excess of freight in May, 1861, under the following circumstances:—

The plaintiffs carried on business as merchants at Liverpool, under the name of Shand & Co., and had a house at Madras some of the partners in which were different from those composing the Liverpool house. In 1861, the Madras house shipped to London for account of the Liverpool house (the plaintiffs) a quantity of cotton on board the ship *Comet*, of which the defendant John Grant was the sole owner. The captain signed bills of lading at Madras which stated the cotton to be deliverable in London on payment of freight "at the rate of 2*l.* 5*s.* per ton of 50 cubic feet, as per margin,"—each bill of lading containing a computation of the freight to be paid thereon, thus,—"*100 bales, measuring 25 tons, 2 feet, at 2*l.* 5*s.* per cubic foot — 56*l.* 7*s.* 5*d.*."*

the aggregate amount of the four bills of lading (three of them were for 200 tons each) being 394*l.* 12*s.* 2*d.* The Comet arrived in the Victoria Docks in April, 1861. Messrs. Tetley & Co., the *325] *plaintiffs' brokers, sent the cotton to Scovell's wharf, sending at the same time one copy of the bills of lading to the wharfinger, and another copy to the plaintiffs at Liverpool. The wharfinger, according to the usual course of business, measured the bales on landing, and delivered a note of the measurement to the defendants, the brokers for the ship. Upon this measurement of the wharfinger the defendants made out the freight-note, and sent it to Tetley & Co., who, not having the bills of lading before them, but relying on the accuracy of the wharfinger's measurement, paid the amount, 483*l.* 0*s.* 5*d.*, in May, 1861. The plaintiffs credited Tetley & Co. with the sum so paid, making no objection to the amount; and the accounts for the voyage were wound up and settled as between the defendants as brokers for the ship and John Grant as owner.

At the close of the year 1862, when the plaintiffs sent out their account-sales to the Madras house, the latter discovered that a larger amount of freight (by 88*l.* 8*s.* 3*d.*) had been paid for the cotton than was warranted by the weights entered in the margin of the bills of lading. The excess was caused by the swelling of the cotton during the voyage or on landing. The plaintiffs thereupon called on the defendants to return the sum so overpaid. This the defendants refused to do, on the ground that their accounts for the voyage were closed and settled. The plaintiffs then brought this action.

At the trial before Erle, C. J., at the sittings in London after last Term, in addition to the above facts, it was proved that the entries in the margin of the bills of lading of the weights and amount of freight had been made in accordance with a resolution of the Madras Chamber of Commerce, which had been come to about twelve years ago, for the *326] express purpose of *preventing disputes which constantly arose from discrepancies between the shipping and the landing weights of cotton. It did not, however, appear that the plaintiffs were aware of this rule. There was no suggestion that either party had acted in the matter otherwise than with perfect bona fides.

On the part of the defendants it was submitted that the plaintiffs, having the bills of lading and the freight-note in their possession, had the means of knowing what was the true amount payable for freight, and, having made the payment with full knowledge or means of knowledge of all the facts, and the defendants having settled their accounts with the ship-owner before they had any notice of the mistake, and in the bonâ fide belief that the payment had been properly made, it was too late for the plaintiffs to seek to recover it back.

For the plaintiffs it was contended that the payment having been made under a mistake of fact, it was inequitable to allow the defendants to retain it; and that the circumstance of the defendants having settled their accounts as brokers to the ship at all events afforded no defence to the defendant John Grant, the owner, and that the record might, if necessary, be amended by striking out the name of Robert Grant.

His Lordship directed the jury to find for the plaintiffs for the

amount claimed, reserving leave to the defendants to move to enter a nonsuit.

Lush, Q. C., on a former day in this term obtained a rule nisi accordingly.—He referred to *Holland v. Russell*, 1 Best & Smith 424 (E. C. L. R. vol. 101). There, A., as agent for a foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance, A. was in possession of a letter from the captain informing him that the ship had received injury, *which fact he, without any fraudulent intention to deceive, [*327 omitted to disclose to the underwriters. The ship was lost, and B., one of the underwriters, paid to A. the amount of his insurance; but, having subsequently become acquainted with the above circumstances, brought an action for money had and received against him to recover it back. A., before he was aware of B.'s intention to dispute the policy, and acting *bonâ fide* throughout, transmitted to his principal the money he had received from the various underwriters, with the exception of a certain amount for which he had allowed the principal credit in a settled account, and of another which, with the authority of the principal, he had expended in a suit brought by him on behalf of the principal against C., another underwriter, on the policy. And it was held,—first (in accordance with the decision in *Russell v. Thornton*, 4 Hurlst. & N. 788, affirmed on error, 6 Hurlst. & N. 140), that, in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters,—secondly, that, A. being only an agent, of which B. was aware, and having, without notice of B.'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, B. was not entitled to recover back from A. his amount of the insurance,—and, thirdly, that there was no difference in this respect between the money actually paid over by A. to his principal, and the moneys which had either been allowed in account between them, or expended in the suit against C.

Montague Smith, Q. C., now showed cause.—The plaintiffs are clearly entitled to retain their verdict. The payment was made in the *bonâ fide* belief that the demand was a just one, and in ignorance of the *fact that the freight-note was based upon a measurement [*328 different from that which was the measurement agreed to in the bills of lading. It is usual among brokers to settle upon the faith of the freight-note. The objection was taken as soon as the mistake was discovered. Notwithstanding a notion which formerly prevailed, in consequence of some dicta,^(a) that, if the party paying the money be guilty of laches, in not availing himself of the means he possesses of ascertaining the true state of facts at the time, it is now clearly settled by the cases of *Kelly v. Solari*, 9 M. & W. 54, *Bell v. Gardiner*, 4 M. & G. 11 (E. C. L. R. vol. 43), 4 Scott N. R. 621, and *Townsend v. Crowdy*, 8 C. B. N. S. 477 (E. C. L. R. vol. 98), that, where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself.

(a) See *Bilbie v. Lumley*, 2 East 469, and *Milnes v. Duncan*, 6 B. & C. 671 (E. C. L. R. vol. 13), 9 D. & R. 731 (E. C. L. R. vol. 22).

Williams, J., in the last case, says: "No doubt, at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But, since the case of *Kelly v. Solari*, it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry." The fact of the brokers having paid over the money to the owner, makes no difference. Here, we have the owner as a defendant on the record. What pretence can he have for retaining the money?

Lush, Q. C., and *Sir George Honyman*, in support of the rule.—It is not necessary to dispute the authority of any of the cases which *829] have held that money paid *in ignorance or mistake of facts may be recovered back. But it is equally clear, that, where the payment has been made under a mistake of the party's legal rights, or with an intention to waive all inquiry as to the facts or the law, the money is not recoverable. The plaintiffs, when they paid the freight, or assented to the payment of it by their brokers, upon the wharfinger's measurement, had the bills of lading before them. It may be that they did not know the legal effect of the note in the margin of the bills of lading; or they may have been unwilling to raise the question. At all events, the action clearly cannot be maintained against the two defendants. *Holland v. Russell* (which was affirmed in the Exchequer Chamber, 32 Law J., Q. B. 297) is not to be distinguished from this case. If the court should think that the record ought to be amended by striking out the name of Robert Grant, it will be upon the same terms, as to costs, as in the case of one of two defendants in an action of tort being struck out,—the successful defendant will have a moiety of the joint costs of the defence.

PER CURIAM.—The plaintiffs are clearly entitled to recover back the money paid by their brokers in excess of the freight really due upon the bills of lading. But they can only recover as against the shipowner, the defendant John Grant. The name of the other defendant, Robert Grant, will be struck out of the record; he having costs which will be taxed by the master in a manner which it is not necessary for us now to state. Subject to that, the rule will be discharged.

Lush submitted, that, inasmuch as the defendants were obliged to come to the court, there should be no costs of the rule.

*830] *WILLIAMS, J.—You came also on a ground which you could not sustain. The costs will be costs in the cause in the usual way.

Rule discharged,—the record to be amended by striking out the name of the defendant Robert Grant, the plaintiffs paying Robert Grant his costs in this cause.(a)

(a) Where one of two defendants in an action of contract is struck out of the record at the trial, and the plaintiff obtains a verdict against the other, the ordinary course of taxation is, to tax the whole costs of the action on each side, and deduct from the plaintiff's costs a moiety of the costs of the defence,—by analogy to the old rule in the case of the acquittal of one of two defendants in an action of tort. *Redway v. Webber*, 13 C. B. N. S. 254 (K. C. L. R. vol. 106).

JOHNSON, Assignee of MATHEW CUMMING, a Bankrupt,
v. STEAR. Nov. 3.

A. deposited a dock-warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock-warrant, and C. took actual possession of the brandies on the 30th:—

Held, that the sale on the 28th, and the delivery of the dock-warrant to the vendee on the 29th,—A. having the whole of that day to redeem it,—amounted to a conversion.

And held by Erle, C. J., Byles, J., and Keating, J., that the proper measure of damages was the actual damage A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal.

But by Williams, J., that the proper measure of damages was the value of the thing converted, —the bailment having been terminated by the wrongful sale.

THIS was an action brought by the plaintiff as assignee of one Mathew Cumming, a bankrupt, for the alleged wrongful conversion by the defendant of 243 cases of brandy and a pipe of wine.

The defendant pleaded not guilty and not possessed, whereupon issue was joined.

*The cause was tried before Erle, C. J., at the sittings in London after last Easter Term. The facts as proved or admitted were as follows:—On the 26th of January, 1862, the bankrupt, Cumming, applied to the defendant for an advance of 62*l.* 10*s.* upon the security of certain brandies then lying in the London Docks. The defendant consented to make the advance, and Cumming gave him his acceptance at one month for the amount, at the same time handing him the dock-warrant for the brandies and the following memorandum:—

“I have this day deposited with you the undermentioned 243 cases of brandy, to be held by you as a security for the payment of my acceptance for 62*l.* 10*s.*, discounted by you, which will become due January 29th, 1863; and, in case the same be not paid at maturity, I authorize you at any time, and without further consent by or notice to me, to sell the goods above mentioned, either by public or private sale, at such price as you think fit, and to apply the proceeds, after all charges, to the payment of the bill: and, if there should be any deficiency, I engage to pay it.

(Signed) “M. CUMMING.”

Then followed an enumeration of the marks and numbers on the cases.

On the 3d of January, Cumming obtained from the defendant a further advance of 25*l.* upon the security of a warrant for a pipe of port wine, with an I. O. U. and a post-dated check (7th January), but no distinct authority, as in the case of the brandies, to sell on default of payment on a given day.

Cumming absconded on the 5th of January, and was declared a bankrupt on the 17th; and the plaintiff was afterwards appointed assignee.

On the 28th of January, the defendant contracted *to sell the brandies to Messrs. Ruck & Co. On the 29th (the day on which Cumming's acceptance became due) the dock-warrant was delivered to them, and on the 30th they took actual possession of the brandies. The check given by Cumming for the second advance

being also dishonoured, the defendant sold the wine for 40*l*. The demand and refusal were on the 27th of February.

On the part of the defendant it was submitted that there was no conversion, and that the transactions were protected, the adjudication being now the dividing line; and that, at all events, the plaintiff was only entitled to nominal damages for the premature sale of the brandies,—it being assumed that the bankrupt had no intention to avail himself of his right of redemption.

Under the direction of the learned judge, the jury returned a verdict for the plaintiff, assessing the value of the wine at 40*l*., and that of the brandies at 62*l*. 10*s*.; and leave was reserved to the defendant to move to enter a verdict for him if the court should be of opinion that the plaintiff was not entitled to recover.

Powell, in Trinity Term, moved for a rule accordingly.

ERLE, C. J.—As to the wine there is no doubt: there was a mere deposit of the warrant as a pledge to secure the repayment of the sum advanced, no day being fixed, and no power reserved to sell on default. The sale, therefore, was clearly a conversion. As to the brandies, however, the rule may go upon both points.

Denman, Q. C., and *Howard*, now showed cause.—The sale of the brandies took place on the 28th of January, or at the latest on the 29th, when the *dock-warrant was handed over to the vendees: *333] *Spear v. Travers*, 4 Campb. 251; *Zwinger v. Samuda*, 7 Taunt. 265, 1 J. B. Moore 12, Holt, N. P. C. 395 (E. C. L. R. vol. 3); *Lucas v. Dorrien*, 7 Taunt. 278 (E. C. L. R. vol. 2), 1 J. B. Moore 29. It was a wrongful dealing with the goods which was inconsistent with the rights of the owner. *Jones v. Cliff*, 1 C. & M. 540, 3 Tyrwh. 576, *Montague on Lien*, App. 185 et seq., and *Cross on Lien*, p. 385, were also referred to.

Powell, Q. C., in support of his rule.—There was no evidence of a conversion of the brandies. It is true there was a contract between the defendant and Ruck & Co. for their sale on the 28th, and the warrant was delivered to them on the 29th: but they did not actually take possession of the brandies until the 30th; until which time it was competent to them to reject them. [ERLE, C. J.—Ruck, who was called as a witness, stated that the contract for sale was absolute on the 28th. There was no contention about that at the trial.] The learned counsel referred to *Ellis v. Hunt*, 3 T. R. 464, and to the authorities collected in *Addison on Torts* 270, 271. He also insisted that the plaintiff could only be entitled to nominal damages, inasmuch as there was no pretence for supposing that the bankrupt intended to redeem the brandies, and, although the sale might have been somewhat premature, the plaintiff was not therefore to lose his lien.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the majority of the court: (a)—

In trover by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock *334] with one Stear, by *delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January; that, on the 28th of January, Stear sold the

(a) Consisting of himself, Byles, J., and Keating, J.

brandy, and on the 29th handed over the dock-warrant to the vendees, who on the 30th took actual possession.

Upon these facts, the questions are,—first, was there a conversion? and, if yes,—secondly, what is the measure of damages?

To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling; and, although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan; for which purpose the dock-warrant would have been an important instrument. We decide for the plaintiff on this ground: and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises.

The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrong-doer who had wilfully appropriated to himself the property of another without any right ought to pay. But we are of opinion that the plaintiff is not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on *that day, created an interest and a [*335. right of property in the goods which was more than a mere lien: and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.

It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan.

If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more: and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion; but, in substance, it is the same cause of action; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid.

There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery v. Viall*, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff; and, because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages; but that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified

against any loss he had really sustained by the resale, yet the defendant as an unpaid vendor had an interest in the *sheep against *336] the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff, from the value of the sheep at the time of the conversion.

In *Story on Bailments*, § 315, it is said: "If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted: and it seems that, by the common law, the pawnee in such action for the value has a right to have the amount of his debt recouped in damages." For this he cites *Jarvis v. Rogers*, 15 Mass. R. 389. The principle is also exemplified in *Brierly v. Kendall*, 17 Q. B. 937 (E. C. L. R. vol. 79). There, although the form of the security was a mortgage, and not a pledge; and although the action was trespass, and not trover; yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff, and sold them. For this wrong he was liable in trespass: but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was to be considered in measuring the extent of the plaintiff's right to damages.

On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that, in measuring *337] *those damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal, and therefore that the verdict for the plaintiff should stand, with damages 40s.

WILLIAMS, J.—I agree with the rest of the court that there was sufficient proof of a conversion; for, although the mere sale of the goods (according to *The Lancashire Wagon Company v. Fitzhugh*, 6 Hurlst. & N. 502) would have been insufficient, yet I think the handing over of the dock-warrant to the vendees before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was tantamount to a delivery. Not that the warrant is to be considered in the light of a symbol, according to the doctrine applied to cases of donations mortis causa; it is the means of coming at the possession of a thing which will not admit of *corporal delivery*.(a)

But I cannot agree with my Lord and my learned Brothers as to the other point; for, I think the damages ought to stand for the full value of the brandies. The general rule is indisputable, that the measure of damages in trover, is, the value of the property at the time of the conversion. To this rule there are admitted exceptions. There is the well-known case of a redelivery of the goods before

(a) *Ward v. Turner*, 2 Ves. sen. 431; *Smith v. Smith*, 2 Stra. 295.

action brought, which, though it cannot cure the conversion, yet will go in mitigation of damages. Another exception is to be found in cases where the plaintiff has only a partial interest in the thing converted. Thus, if one of several joint-tenants or tenants in common alone brings an action against a stranger, he can recover only the value of his share. So, if the plaintiff, though solely entitled [*338 to the possession of the thing converted, is entitled to an interest limited in duration, he can only recover damages proportionate to such limited interest, in an action against the person entitled to the residue of the property (though he may recover the full value in an action against a stranger). The case of *Brierly v. Kendall*, which my Lord has cited, is an example of this exception. There, the goods had been assigned by the plaintiff to the defendant by a deed the terms of which operated as a re-demise, and, since the defendant's quasi estate in remainder was not destroyed or forfeited by his conversion of the quasi particular estate, the plaintiff, as owner of that estate, was only entitled to recover damages in proportion to the value of it.

With respect, however, to liens, the rule, I apprehend is well established, that, if a man having a lien on goods abuses it by wrongfully parting with them, the lien is annihilated, and the owner's right to possession revives, and he may recover their value in damages in an action of trover. With reference to this doctrine, it may be useful to refer to *Story on Bailments*. In § 325, that writer says: "The doctrine of the common law now established in England, after some diversity of opinion, is, that a factor having a lien on goods for advances or for a general balance, has no right to pledge the goods, and that, if he does pledge them, he conveys no title to the pledgee. The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods even for the advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatever for the debts due by him to the factor." After stating that the English legislature had at length interfered, *the learned author continues, in [*339 § 326,—"In America, the general doctrine that a factor cannot pledge the goods of his principal, has been repeatedly recognised. But it does not appear as yet to have been carried to the extent of declaring the pledge altogether a tortious proceeding, so that the title is not good in the pledgee even to the extent of the lien of the factor, or so that the principal may maintain an action against the pledgee without discharging the lien, or at least giving the pledgee a *right to recover the amount of the lien in the damages*." But, in the 6th edition, by Mr. Bennett, it is added,—"Later decisions have, however, fully settled the law, that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover the whole value of the pledgee, *without any deduction or recoupment for his claim against the factor*." And I may mention that I have reason to believe this rule as to liens was acted upon a few days ago in the Court of Queen's Bench.(a)

But it is said that the maintenance of such a rule in respect of

(a) *Siebel v. Springfield*, 9 Law T. N. S. 325.

pledges is inconsistent with *Chinery v. Viall*, mentioned by my Lord. It seems to me, however, that the decision of that case does not interfere with the general rule as to damages in trover, but only establishes a further exception in the peculiar and somewhat anomalous case of an unpaid vendor, whose right in all cases has been deemed to exceed a lien: see *Blackburn on Contracts*, p. 320. I cannot, however, think, that this exception can be properly extended to the case of a pledgee. An unpaid vendor has rights independent of and antecedent to his lien for the purchase-money. But the property of a pledgee is a mere creature of the transaction of bailment; and, if the bailment is terminated, must surely perish with it. Accordingly,

*340] it is said in *Story on Bailments*, § 327,—“It has been intimated that there is, or may be, a distinction favourable to the pledgee, which does not apply, or may not apply, to a factor, since the latter has but a lien, whereas the former has a special property in the goods. It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal as a security and pledge for his advances and other dues. He has a special property in them, and may maintain an action for any violation of this possession, either by the principal or by a stranger. And he is generally treated, in judicial discussions, as in the condition of a pledgee.” Again, in § 299,—“As possession is necessary to complete the title by pledge, so, by the common law, the positive loss or the delivery back of the possession of the thing with the consent of the pledgee, *terminates his title*.” And, further, in the same section,—“If the pledgee voluntarily, by his own act, places the pledge beyond his own power, as, by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge.”(a)

It should seem, then, that the bailment in the present case was terminated by the sale before the stipulated time; and, consequently, that the title of the plaintiff to the goods became as free as if the bailment had never taken place. If he had brought an action against an innocent vendee, the passage I have already cited from *Story*, § 325, demonstrates that he might have recovered the absolute value of the goods as damages. Why should he be in a worse condition in respect of an action against the pledgee who has violated the contract of pledge?

The true doctrine, as it seems to me, is, that, whenever the plaintiff *341] could have resumed the property, if he *could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption.

In the present case, I think it plain that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner, against all the world. And I therefore think he ought to recover the full value of them in this action.

Nor can I see any injustice in the defendant's being thus remitted

a) See *Whitaker v. Sumner*, 20 Pick. R. 390.

to his unsecured debt, because his lien has been forfeited by his own violation of the conditions on which it was created.

Rule absolute to reduce the damages to 40s.

In the principal case the defendant sold the goods, pledged with him to secure a loan, before the day of repayment had arrived. Although an action of trover was brought for the wrongful conversion, the damages were limited to such as could have been recovered had the action been one for the breach of the contract; and as the plaintiff's assignor had no intention, being a bankrupt, to repay the loan, the damages were merely nominal.

In *Donald v. Suckling*, the plaintiff pledged, as security for the payment at maturity of a bill of exchange endorsed by him, debentures with a broker who discounted the draft. Before it fell due, the broker repledged the debentures to the defendant as security for a loan to himself larger than the amount of plaintiff's draft. The court refused to sustain an action of detinue for the debentures, on the ground that the plaintiff was not entitled to reclaim them until he had paid the debt to secure which they were originally given, notwithstanding the broker's violation of his duty as a bailee. The breach of duty did not terminate the bailment, but only justified, as in the principal case, an action for the damages which the plaintiff had actually suffered: *L. R. 1 Q. B. 585*. In *Halliday v. Holgate*, certificates of shares in a mining company were pledged to secure the repayment of a loan, advanced without mention of the period of credit. The pledgee, after the bankruptcy of the pledgor, sold without a demand for repayment, and without notice of his intention to sell, upon the bankrupt or his assignee, a portion of the certificates. The assignee, without tendering payment, brought trover against the pledgee for

the value of the certificates. The Court of Exchequer nonsuited the plaintiff, and this decision was affirmed on appeal in the Exchequer Chamber: *37 L. J. R. Ex. 174*; *L. R. 3 Ex. 299*.

These decisions indicate the direction of the development which the law is at present undergoing. As the modern inclination is to assimilate the forms of action, the measure of damages for the breach of the bailment is equalized in the actions of assumpsit, trespass, and trover, which are allowed to be maintained, and the action of detinue is refused, in part upon the ground that were it sustained, a different estimate would be established.

The American decisions follow, in the main, the English precedents, and commend the rule, as sound, which limits the damages to the value of the pledge at the time of the wrongful conversion. Thus the decision in the principal case was expressly recognised and acted upon in *The Baltimore Marine Insurance Company v. Dalrymple*. There the stock pledged as collateral security for the repayment of a loan, was, after demand, and default, put up for sale, and bought in by the pledgee, who subsequently sold it at private sale. It was held to be at the pledger's election to treat the first sale as a conversion, or as a continuation of the bailment, (*Middlesex Bank v. Minot*, 4 Met. Mass. 325). The second sale was a conversion, but the damages were limited to the value of the stock at the time of the sale, over and above the amount of the loan which it was given to secure: *25 Md. (1866) 269*; *Bulkeley v. Welch*, 31 Conn. (1863) 339.

In *Lewis v. Mott*, Brown pledged with How, Illinois scrip for \$2000 as

R. C. F. VANQUELIN *v.* BOUARD. Nov. 19.

The first count of the declaration stated that one V., a French subject domiciled in France, drew certain bills at Orleans upon the defendant at Paris; that V. endorsed them to one B.; that, the bills being dishonoured, B. obtained judgment against the defendant and V. in an action thereon in the court of the Tribunal of Commerce of the department of the Seine, a court of competent jurisdiction in that behalf; that, according to the laws of France, in case V. satisfied the judgment, the defendant would become liable to pay V. the amount with interest, and V. would become entitled to the benefit of the judgment against the defendant, and would be substituted for B. in all his rights upon the same against the defendant, and entitled to enforce the same for his own benefit against the defendant; that afterwards and whilst the judgment was in full force and unsatisfied by either the defendant or V., the latter died in France, and the plaintiff, his widow, became, in accordance with the laws of France, "the donee of the universality of the real and personal estates belonging to the succession of V. at his death, and thereby, and according to the laws of the said empire, all rights, claims, and causes of action, and also all liabilities and obligations of V., vested in her personally and absolutely, and she became according to the said laws liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of V., and she was, according to the said laws, substituted for, and placed in the same position with respect to the defendant as regards the said bills and the said judgment thereon, to all intents and purposes as V. had been in his lifetime;" that, afterwards, the plaintiff was obliged to pay and did pay the amount of the said judgment and interest, and thereupon B. delivered to her the bills and the record of the judgment, and the plaintiff then became and was, according to the laws of France, entitled to the benefit of all the rights of B. upon the judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for B. in all his rights against the defendant in respect of the judgment, and the defendant became indebted and liable to pay the plaintiff the amount so paid by her, with interest; that, the defendant having neglected to pay the moneys so due from him to the plaintiff, the latter, in order to keep alive the liability of the defendant, and to prevent the same from being barred by lapse of time, and also in order to give effect to and enforce her claim upon the said judgment, took proceedings in the Tribunal Civil of the First Instance of the department of the Seine, being a court of competent jurisdiction in that behalf, and, according to the practice and procedure of that court, on the 2d of April, 1862, by adjudication of the court, an injunction was made to the defendant, in the name of law and justice, to pay within twenty-four hours to the plaintiff certain sums for principal, interest, and expenses; that all conditions precedent, &c., had been complied with to entitle the plaintiff according to the laws of France to be paid those several sums; and that they remained unpaid.

Held, on demurrer to this count, that it sufficiently disclosed a right in the plaintiff to sue in respect of the cause of action therein mentioned in the French courts in her own name, and consequently that it was competent to her to maintain an action here in respect of the payment so made by her after her husband's death, without taking out letters of administration in this country.

To this count the defendant pleaded that the bills were not drawn at Orleans, as alleged:—Held, bad.

He further pleaded (11), that the sums alleged to be due by virtue of the said judgment and injunction, and under the circumstances mentioned in the count, would, according to the laws of France, form part of the succession of the deceased, and be assets in the hands of the plaintiff as such donee of the universality of the real and personal estates belonging to the succession of the deceased, to be administered, such donee being, according to the said laws, the representative of the deceased in France, and entitled to the said sums of money in her representative character, and not otherwise:—Held, a bad plea, upon the same ground that the count was held good.

He further pleaded (12), that the judgment in the first count mentioned was a judgment by default for want of appearance by the defendant in the court of the Tribunal de Commerce, and by the law of France would become void as of course on an appearance being entered:—Held, bad; for that the possible contingency of the judgment of the foreign court being set aside there, is no answer to an action to enforce it here.

He further pleaded (13), that the court of the Tribunal de Commerce was not a court of competent jurisdiction according to the French law, because the defendant was not a trader when he accepted the bills, and because the bills falsely purported to be drawn at Orleans, whereas they were not drawn there, nor was the drawer domiciled there at the time the bills were drawn:—Held, bad,—it sufficiently appearing that the Tribunal de Commerce had jurisdiction over the subject-matter of the suit, and that the matters alleged in the plea were matters which (if any defence) might and ought to have been set up by way of defence in that court.

The second count stated, that certain bills of exchange were drawn upon the defendant by V., and accepted by him and dishonoured, that V. died, and the plaintiff was according to the laws of France "the donee of the universality of the personal and real estates belonging to the succession of V., and thereupon became entitled to all debts, claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner as they were vested in V., and the plaintiff was entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and she became entitled to sue the defendant thereupon in her own name and in her own right:—Held, good,—it sufficiently appearing that the plaintiff was entitled to sue upon the bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the law of France rights different from those which an executor or administrator has in this country.

For the same reasons, a plea (16) to the second count, that the plaintiff was not executor or administrator of V., deceased, was held bad.

The 18th plea,—to both counts,—stated that V. and the defendant, in France, agreed to purchase for their joint benefit a debt due to one Q., and charged upon certain property in France; that it was agreed upon between them that V. should advance the purchase-money, and that the defendant should accept the bills in the declaration mentioned as a security to the deceased in case the debt should not realize the amount of the purchase-money; that, except as aforesaid, there was never any value or consideration for the acceptance of the bills; that V. recovered a large sum in respect of the said debt, and retained the same; and that the share thereof belonging to the defendant, and so retained by V., was more than sufficient to satisfy the claim of V. in respect of the said judgment and bills:—Held, that this plea was a good answer to the claim in the second count, as amounting to an allegation that the bills were accommodation bills and that there was no value or consideration for their acceptance; but that it afforded no answer to the first count.

That which constitutes a defence in the foreign court is not pleadable in an action upon the judgment in the courts of this country.

The rule, that, in order to entitle a party to sue in any court of this country, whether of law or equity, in respect of the personal rights of a testator or intestate, he must appear to have obtained probate or letters of administration from the proper court here, is subject to this qualification, that he is suing in right of the deceased.

THE first count of the declaration stated that theretofore, to wit, in the year 1840, at Orleans, in the empire of France, one J. A. F. Vanquelin, being a French *subject, and domiciled in the said [*342 empire, by three certain bills of exchange directed to the defendant at Paris, required the defendant to pay to his the said J. A. F. Vanquelin's order, at the several times therein mentioned, certain sums of money amounting in the *whole to the sum of 14,000 [*343 francs in money of the said empire, and the defendant, in Paris, accepted the said bills, and the said J. A. F. Vanquelin endorsed the said bills in France aforesaid to one Bolli; and the said bills arrived at maturity, and according to the laws of the said empire the defendant was under the primary obligation to honour and pay the amount of the said drafts, and the said J. A. F. Vanquelin was also liable as drawer of the same to pay and take up the same in case the defendant dishonoured the same; and the said bills were all dishonoured by the defendant; and afterwards, according to the laws of the said empire, the said Bolli, as the holder and endorsee of the said bills, took proceedings in the Court of the Tribunal of Commerce of the department of the Seine, which was a court of competent jurisdiction in that behalf, against the defendant as acceptor and the said J. A. F. Vanquelin as drawer of the said bills, in order to enforce payment thereof; and certain proceedings were thereupon duly had in the said court, according to the laws of the said empire, and according to the *practice and procedure of the said court; and a judgment of the said court was obtained by the said Bolli against [*344

the said J. A. F. Vanquelin and the defendant; and by the said judgment it was adjudged and considered that the defendant and the said J. A. F. Vanquelin were indebted to the said Bolli jointly and severally in the said amount of the said bills, namely 14,000 francs of money of the said empire, being equal to 560*l.* sterling money of Great Britain, together with interest at the rate of 6 per cent. per annum from the day of the maturity of each bill till judgment; and the defendant and the said J. A. F. Vanquelin were condemned to pay the said amount, together with costs; and thereupon, according to the laws of the said empire, the said J. A. F. Vanquelin was, according to the said laws, under an obligation to satisfy the amount of the said judgment, being the said principal sums and interest, and also further to pay interest upon the amount of the said judgment at the said rate till payment; and also, according to the said laws, the defendant was liable to the said J. A. F. Vanquelin for the amount of the said bills, and in case the said J. A. Vanquelin paid the amount of the judgment to the said Bolli, the defendant would become liable to pay the said J. A. F. Vanquelin the amount of the said judgment, together with interest upon the same at the rate of 6 per centum per annum until payment, and the said J. A. F. Vanquelin would become entitled to the benefit of the said judgment against the defendant, and would be substituted for the said Bolli in all his rights upon the same against the defendant, and entitled to enforce the same for his own benefit against the defendant: Averment, that afterwards, and whilst the said judgment was in full force and unsatisfied by either the defendant or the said J. A. F. Vanquelin, the said J. A. F. Vanquelin died within the said empire

*345] of France, and the plaintiff was, in accordance with the laws of the said empire, *the donee of the universality of the real and personal estates belonging to the succession of the said J. A. F. Vanquelin at his death, and thereby, and according to the laws of the said empire, all rights, claims, and causes of action, and also all liabilities and obligations of the said J. A. F. Vanquelin vested in the plaintiff personally and absolutely, and the plaintiff became, according to the said laws, liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of the said J. A. F. Vanquelin, and the plaintiff was according to the said laws substituted for and placed in the same position with respect to the defendant as regards the said bills of exchange and the said judgment thereon to all intents and purposes, as the said J. A. F. Vanquelin had been in his lifetime: That, afterwards, and whilst the said judgment was in full force and unsatisfied, and the plaintiff and defendant were both liable thereupon, the plaintiff, in accordance with the said laws, was obliged to pay and did pay the full amount of the said judgment and all interest due thereon: and thereupon the said Bolli, according to the laws of the said empire, delivered to the plaintiff the said bills of exchange and the record of the said judgment, and the plaintiff then became and was and still is according to the laws of the said empire entitled to the benefit of all the rights of the said Bolli upon the said judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for the said Bolli in all his said rights against the defendant in respect of the said judg-*

ment, and the defendant became and was indebted and liable to pay to the plaintiff the amount so paid by the plaintiff upon the said judgment, together with 6 per centum per annum interest *thereupon until payment: That afterwards, and before this suit, the [*346 defendant having neglected and refused to pay to the plaintiff the said moneys so due from him to the plaintiff as aforesaid, the plaintiff in order to keep alive the said liability of the defendant, and to prevent the same being barred by lapse of time, and also in order to give effect to and enforce her said claim against the said defendant for the said moneys due upon the said judgment, and the further interest due upon the same, took proceedings in the said court, namely, the Tribunal Civil of the First Instance of the department of the Seine, being a court of competent jurisdiction in that behalf, and certain proceedings were thereupon had in the said court, according to the laws of the said empire and the practice and procedure of the said court, against the defendant at the suit of the plaintiff; and thereupon, according to the practice and procedure of the said court, that is to say, on the 2d of April, 1862, by adjudication of the said court, an injunction was made to the defendant in the name of law and justice to pay within twenty-four hours to the plaintiff the several sums of money following, that is to say,—first, 14,000 francs of money of the said empire, being the principal amount of the said bills of exchange,—secondly, 17,640 francs of money of the said empire for interest upon the same at the rate of 6 per centum per annum from the 2d day of February, 1841, to the 2d day of February, 1862,—thirdly, the interest from the said 2d of February, 1862, until payment, at the said rate,—fourthly, 152fr. 60c. of money of the said empire, for costs; and, failing to do so, it was adjudged and notified to the defendant that he would be constrained to do so by all lawful means and by arrest of his body: And that all conditions precedent were performed, and all times elapsed, and all matters and things had been *done and happened, necessary to entitle the plaintiff according [*347 to the laws of the said empire to be paid the said sums of money, amounting in the whole to the equivalent in sterling money of Great Britain of 1285l. 10s. 10d., which the defendant was so enjoined to pay to her as aforesaid; and that the defendant's liability to pay the same still was, at the commencement of this suit, and still is, in full force and effect; and the defendant wholly refuses to pay the same, or any part thereof, and the whole remains due and unpaid.

The second count stated, that theretofore, to wit, at Orleans, in the empire of France, one J. A. F. Vanquelin, by his three several bills of exchange, now overdue, directed to the defendant, at Paris, in the said empire, required the defendant to pay to his the said J. A. F. Vanquelin's several orders the three several sums of money following, that is to say, one bill for 5000 francs of the money of the said empire, another bill for 4000 francs of the said money, and a third bill for 5000 francs of the said money, amounting in the whole to 14,000 francs, being of the equivalent value of 560l. sterling money of Great Britain, at the several dates therein mentioned; and the defendant accepted the said bills; and the defendant thereupon became liable according to the laws of the said country to honour and pay the said drafts at maturity; and the defendant dishonoured the said drafts and

each of them; and thereupon, according to the laws of the said empire, the defendant became indebted to the said J. A. F. Vanquelin, in the several amounts of the said bills, and liable to pay to him the said amounts of each, together with 6 per cent. interest thereon until payment; and afterwards, and before this suit, and whilst the whole of the said several principal sums due from the defendant to the said J. A. F. Vanquelin, together with the said interest, were due and *348] wholly unpaid, *and the defendant's liability to pay the same and each of them was in full force and effect, the said J. A. F. Vanquelin died, and the plaintiff was, according to the laws of the said empire, *the donee of the universality of the personal and real estates belonging to the succession of the said J. A. F. Vanquelin, and thereupon became entitled to all debts, claims, and causes of action which the said J. A. F. Vanquelin was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner to all intents and purposes as they were vested in the said J. A. F. Vanquelin*, and the plaintiff was and is entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the said J. A. F. Vanquelin upon the said several bills of exchange became vested in the plaintiff, and the plaintiff became entitled to sue the defendant thereupon in her own name and in her own right: Averment, that the defendant had wholly refused or neglected to pay the plaintiff the amount of the said bills and interest, or any part thereof; and, at the commencement of this suit, the whole remained unpaid, and the defendant was justly indebted to the plaintiff in respect of the premises and according to the said laws in the sum of 31,990 francs in money of the said empire, for the principal of the said three bills of exchange, and interest thereon at the said rate, being equal to 1279*l.* 10*s.* 6*d.* sterling money of Great Britain; and that the defendant had neglected and refused to pay the same or any part thereof.

The third count was for money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request, and also for interest for the forbearance at interest at the defendant's request of moneys due and owing from the defendant to *349] the plaintiff, and also for money found to be due *from the defendant to the plaintiff upon accounts stated between them, and also for money promised by the defendant to the plaintiff to be paid in accordance with a certain judgment of a certain court in France whereby the defendant was declared and adjudged to be indebted to the plaintiff in a large sum of money, and was enjoined thereby to pay the same to the plaintiff. Claim 2000*l.*

The defendant demurred to the first count, on the ground that "the said count does not allege that the plaintiff is the legal personal representative of the said deceased *in this country*, nor any legal title in the plaintiff to sue in this country upon the said judgment; and also that the said count does not allege that the judgment first mentioned therein was final and definitive." Joinder.

He also demurred to the second count, on the ground that "the said count does not allege that the plaintiff is the legal personal representative of the said deceased *in this country*, nor any legal title in the plaintiff to sue upon the said bills in this country." Joinder.

The defendant also pleaded,—first, to the first count, that, though the said J. A. F. Vanquelin drew the said bills of exchange, yet he did not draw them at Orleans, as alleged.

Eleventh plea, to the first count, that the sums of money alleged to be due by virtue of the said judgment and the said injunction and under the circumstances in the said count mentioned, would, according to the laws of the said empire of France, form part of the succession of the said J. A. F. Vanquelin, deceased, and be assets in the hands of the plaintiff as such donee of the universality of the real and personal estates belonging to the said succession of the said deceased to be administered, such donee being according to the *said [*350 laws the representative of the said deceased in France, and entitled to the said sums of money in her said representative capacity, and not otherwise; and that the plaintiff is not in this country the executrix of the last will and testament of the said J. A. F. Vanquelin, deceased, or the administratrix of the goods, chattels, and credits which were of the said J. A. F. Vanquelin, deceased, at the time of his death.

Twelfth plea, to the first count, that the judgment in the said count first mentioned, was a judgment by default against the defendant for not appearing in the said proceedings in the said Court of the Tribunal of Commerce, and that, according to the law of France, the said judgment and the said injunction in the said count mentioned would become void and of no effect, as of course, as soon as the defendant entered an opposition to the said judgment in the said court in which the same was obtained.

Thirteenth plea, to the first count, that the said judgment of the said Court of the Tribunal of Commerce was a judgment by default for want of appearance by the defendant; and that the said court was not a court of competent jurisdiction in that behalf, as alleged, according to the laws of the said empire, because the defendant was not a trader when he accepted the said bills, and because the said bills falsely purport to have been drawn at Orleans, whereas the said bills were not drawn at Orleans; and that the said J. A. F. Vanquelin was not there domiciled at the time the said bills were so drawn as aforesaid.

Sixteenth plea, to the second count, that the plaintiff is not in this country the executor of the last will and testament of the said J. A. F. Vanquelin, deceased, or the administrator of the goods, chattels, and credits which were of the said J. A. F. Vanquelin, deceased, at the time of his death.

*Eighteenth plea, to the first and second counts, that the said J. A. F. Vanquelin, deceased, and the defendant, in the [*351 said empire of France, agreed to purchase for their joint benefit a certain debt due to one Madame de Quereque, and charged upon certain property in France, at a certain price which was below the amount of the said debt; and it was agreed between them that the said deceased should advance the purchase-money, and that the defendant should accept the said bills in the said counts mentioned as a security to the said deceased in case the said debt should not realize the amount of the said purchase-money; and that, except as aforesaid, there was never any value or consideration for the defendant's accepting the said bills; and that the said deceased recovered and received a

The Attorney-General *v.* Bouwens, 4 M. & W. 171, 191, where this subject is very fully discussed, Lord Abinger, C. B., says: "Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in pios usus. As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute: but, to prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it was established as law that judgment-debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty-debts, where the instrument happens to be; and simple-contract-debts, where the debtor resides at the time of the testator's death: and it was also decided, that, as bills of exchange and promissory notes do not alter the nature of the simple-contract debt, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found." The first plea is clearly bad. [*Lush*, Q. C., conceded that.] The eleventh plea,—that the money alleged to be due by the law of France formed part of the succession of the deceased,—is also bad. It *356] does not deny the *plaintiff's liability to pay the amount of the judgment to Bolli, or the fact of the payment; nor does it even allege that it formed assets of the deceased in this country; and, for the reasons already urged, it is no answer to the plaintiff's claim to say that that which she is seeking to recover formed assets in France, and that the plaintiff has not obtained probate or letters of administration here. The twelfth plea addresses itself to the judgment of the court of the Tribunal de Commerce. As it stands, it is a valid judgment: but it is not needed to sustain the present action. The thirteenth plea is also clearly a bad plea. By the comity of nations, the judgment of a foreign court is held to be conclusive of the rights between the parties, unless it be shown that there was a total absence of jurisdiction, and that the proceeding was contrary to natural justice. The courts here cannot try questions which might have been tried, and must be assumed to have been properly tried, in the foreign court. The authorities upon this subject are so well known that it is hardly necessary to refer to them. They will all be found collected in the notes to *The Duchess of Kingston's Case*, in 2 *Smith's Leading Cases*, 5th edit., 682 et seq. The question sought to be raised by the sixteenth plea, that the plaintiff is not executor or administrator of the deceased in this country, is already disposed of. And the eighteenth plea discloses only matter which might have been urged by way of defence in the foreign court.

Lush, Q. C. (with whom was *H. J. Hodgson*), *contra*(a)—"The gene-

(a) The points marked for argument on the part of the defendant were as follows:—

As to the demurrers to the declaration,—As to the first count,—"That the plaintiff claims according to the laws of France as the universal donee of the succession belonging to the deceased Vanquelin, and in that capacity and in his right to enforce the said judgment against the defendant; but that, though the count states that the plaintiff was by the laws of France substituted for the deceased Vanquelin with respect to the defendant, as regards the said bills of exchange and the said judgment thereon to all intents and purposes, it does not appear that

ral rule is, that, in order to sue in "any court of this country, whether of law or equity, in respect of the personal rights or property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the proper spiritual court of this country." 1 Williams on Executors, 5th *edit., 321: and see the judgment of Tindal, C. J., in *Whyte v. Rose*, 3 Q. B. 493 (E. C. L. R. vol. 43), 2 Gale & D. 312. It is immaterial where the money when recovered will be administered. No doubt, a judgment-debt constitutes assets where the judgment is recorded: but that means a judgment of a court in this country. A simple-contract-debt is assets only where the debtor is found: and here a foreign judgment ranks among simple-contract-debts. The question is, does the plaintiff claim the money from the defendant as representing her deceased husband? If she does, her title to sue must be vouched by the proper spiritual court here. The declaration is studiously ambiguous in this respect: it alleges that the plaintiff is "the donee of the universality of the real and personal estates belonging to the succession of Vanquelin at his death, *and thereby and according to the laws of France, all rights, claims, and causes of action, and also all liabilities and obligations of Vanquelin, vested in the plaintiff personally and absolutely, and the plaintiff became, according to the said laws, liable personally upon the said judgment, and also entitled personally in her own name to sue for and enforce all the rights and claims of Vanquelin." In what does that substantiality differ from

the plaintiff is the legal personal representative in this country: "and that the said judgment is not final and definitive."

As to the second count,—“That the count states certain acceptances of the defendant in favour of the deceased Vanquelin, and that the amount thereof was due to the deceased at the time of his death; but, though the count shows that the same passed to the plaintiff according to the laws of France on the death of the said deceased, there is no allegation that the plaintiff is the legal personal representative in this country of the said deceased.”

As to the demurrers to the pleas,—

As to the first plea,—“That, an immaterial traverse cannot be demurred to; but, as the averment relates to a bill of exchange drawn in a foreign country, there is nothing to show that the traverse is immaterial.”

As to the eleventh plea,—“The plea alleges that the subject-matter of the first count is part of the estate of the deceased Vanquelin, and that the plaintiff is entitled to it in France in her capacity as representing the deceased, and not otherwise; and, that being so, the plaintiff is not entitled to sue in her own right in this country. Her having in her representative capacity in France discharged the liability of the deceased, cannot put her in a better position than if the deceased himself had discharged it. The count shows that the plaintiff sues only in right of the deceased, and does not aver that she is his legal personal representative in this country.”

As to the twelfth plea,—“The plea shows that the judgment declared upon is not binding, since it would become void and of no effect, as of course, upon the defendant merely entering an opposition to it. This is not like a judgment by default for non-appearance in this country.”

As to the thirteenth plea,—“The count alleges that the said court was a court of competent jurisdiction, and this plea traverses that averment, and states the law of France upon that point. The whole matter, therefore, was *coram non iudice*, and the court in France must have been misled.”

As to the sixteenth plea,—“The second count, to which this plea is pleaded, is founded upon the defendant's alleged acceptances in favour of the deceased Vanquelin, and alleges that they were due to him at the time of his death. The plaintiff may be the legal representative of the deceased Vanquelin in France; but no person can sue in the courts of this country in right of a deceased, except his legal personal representative empowered or appointed by the proper tribunal of this country.”

As to the eighteenth plea,—“The plea shows, that, out of money belonging to the defendant, the said Vanquelin retained more than sufficient to satisfy his claim in respect of the said judgment and bills of exchange, and that therefore he has been paid.”

the position of an executor or administrator here? [ERLE C. J.—The rights and liabilities of the testator or intestate do not devolve *personally and absolutely* on his executor or administrator.] It is not alleged that the plaintiff would be liable according to the French law beyond the amount of the assets coming to her hands. If this debt when recovered would form part of the deceased's assets or "succession," the plaintiff can only sue for it as his administratrix: King v. Thorn, 1 T. R. 489; Ord v. Fenwick, 8 East 103. [WILLIAMS, J.—It was not necessary for the plaintiff, under the circumstances stated in this declaration, to have probate or letters of administration to entitle her to sue. The payment to Bolli was after the death of Vanquelin: the plaintiff was not bound to sue in a representative character.] The judgment of Lord Ellenborough in Ord v. Fenwick shows that she was. [ERLE, C. J.—It was enough, to sustain Lord Ellenborough's proposition there, that the plaintiff *might* have sued as executrix.] The plaintiff is not suing here upon a judgment obtained by her in France: the proceeding in the Tribunal Civil of the First Instance of the department of the Seine, was merely a proceeding founded upon and intended to enforce the judgment of the Court of the Tribunal of Commerce. The second count raises another question. There is no allegation there that the plaintiff has paid any money, *360] so as to found a right in herself. The *eleventh plea deals with the judgment and the proceeding to enforce it. If the first count makes the plaintiff no more than an executrix or administratrix, the eleventh plea is a good answer to that: it is a traverse that she fills that character. So that either the declaration is bad, or the plea is good as traversing what the plaintiff alleges to the contrary. She alleges that the character with which she is clothed entitles her (in France) to sue, not "in her own right," but "in her own name," which is no more than an executor might say. As to the twelfth plea, it is clear that there can be no cause of action here upon a judgment of a foreign court which is not final in the country where it is obtained. This plea alleges that the defendant might come in at any time and set that judgment aside. The thirteenth plea is a denial of the jurisdiction of the court in which the judgment was obtained. It goes on to allege why: but that is wholly immaterial; for, the foreign law is only matter of evidence. The sixteenth plea is a good answer to the second count if the argument that the plaintiff was bound to sue in a representative character is well founded. As to the eighteenth plea,—if there was a special bargain such as is alleged in this plea, no implied promise to repay the money could arise. As regards the second count, the plea amounts in substance to this, that the bills were accepted for the accommodation of the drawer, and that there was no value or consideration for the defendant's acceptance.

Smith, in reply.—The first count distinctly avers that the plaintiff is suing, not in a representative character, but in her own right. If she was entitled to sue in her own right in respect of this cause of action in France, she is entitled to do so here. [ERLE, C. J.—We think the first count tenable on the ground put by *my Brother Wil-
*361] liams, viz., that the plaintiff paid the money after the death of Vanquelin, and so became entitled to sue in her own name and right.

Address your attention to the second count, and to the pleas, and more especially to the eighteenth. WILLIAMS, J.—In whatever language you put it, you cannot disguise the fact that the plaintiff was the personal representative of her husband in France. The second count relies on a cause of action which accrued to the husband in his lifetime.] The second count alleges that the bills were drawn and accepted in France, that the plaintiff was donee of the universality, and as such entitled by the law of France to sue in her own name and in her own right in respect of claims and causes of action accruing to her in that character: and this is not traversed: consequently that which is essential to give her the right so to sue in France is admitted. [KEATING, J.—What is the precise position of the “donee of the universality” by the French law? *Hodgson*.—If she chooses to take the assets without inventory, she becomes liable to all the debts and obligations of the deceased: but, if she avails herself of the benefit of inventory, her liability is limited to the value of the assets.] What the law of France may be, is only matter of proof, if traversed. The eleventh plea is sufficiently answered by what has already been said. The twelfth plea shows that the judgment is an existing judgment. [WILLIAMS, J.—What judgment?] The judgment obtained by Bolli in the Court of the Tribunal de Commerce. The other is a proceeding in a different court—an injunction to pay. As to the thirteenth plea,—whether the defendant was a trader or not, or whether the allegation that the bills were drawn at Orleans were true or not, were matters properly triable in the Tribunal of Commerce. These are matters which it is not for this court to enter into. *Where the court in which the judgment, whether foreign or colonial, is pronounced has jurisdiction over the subject-matter and over the person of the defendant, and it appears that he has had an opportunity of, making his defence there, the grounds of the judgment cannot be impeached in an action upon the judgment in our courts: The Bank of Australasia *v.* Nias, 16 Q. B. 717 (E. C. L. R. vol. 71); *Castrique v. Imrie*, 8 C. B. N. S. 1 (E. C. L. R. vol. 98); *Imrie v. Castrique*, 8 C. B. N. S. 405. [WILLIAMS, J.—You say that the effect of the judgment by default in the French court is, to admit that the plaintiff was in a position to prove everything that was necessary to give him success in the action?] Yes. As to the eighteenth plea, if what is there alleged was part of the original bargain or arrangement, it might have been set up as a defence in the French court. The statement in that plea is at all events no answer to the allegation in the declaration that the plaintiff was obliged to pay the amount of the judgment to Bolli, and thus became by the law of France entitled to enforce it against the defendant. The facts, if true, might possibly be an answer to the second count, as showing in effect that the bills were accommodation bills; and, if it had been confined to that, it probably would not have been demurred to. [WILLIAMS, J.—Our judgment may be divided on the demurrer to that plea.]

Hodgson, with the permission of the court, referred to the following additional authorities:—*Havelock v. Rockwood*, 8 T. R. 268; *Bowles v. Orr*, 1 Y. & C. 464; *Plummer v. Woodburne*, 4 B. & C. 625 (E. C. L. R. vol. 10), 7 D. & R. 25; *Smith v. Nicolls*, 7 Scott 147, 5 N. C.

222, 7 Dowl. P. O. 282, and *Patrick v. Shedden*, 2 Ellis & B. 14 (R. C. L. R. vol. 75).^(a)

*363] *ERLE, C. J.—Upon the argument of these demurrers, several questions have been raised with reference to the French law. The foundation of the litigation was certain bills of exchange of which the deceased, Jacques Alexander François Vanquelin, was drawer, the defendant the acceptor, and one Bolli the endorsee. Bolli brought an action against both drawer and acceptor in the Court of the Tribunal de Commerce of the department of the Seine, and obtained judgment against them. Vanquelin, the drawer, died: his widow, the now plaintiff, in accordance with the laws of France, became the donee of the universality of the real and personal estates belonging to the succession of the deceased at his death; and she alleges that thereby and according to the laws of France all rights, claims, and causes of action, and all liabilities and obligations of the deceased vested in her personally and absolutely, and she became, according to the said laws, liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of the deceased, and that she was according to the said laws substituted for and placed in the same position with respect to the defendant, as regarded the said bills of exchange and the judgment thereon, to all intents and purposes, as the deceased had been in his lifetime. The count then goes on to allege that afterwards, and whilst the judgment was in full force and unsatisfied, and the plaintiff and defendant were both liable thereupon, the plaintiff, in accordance with the laws of France, was obliged to pay and did pay the full amount of the judgment and all interest due thereon, and that thereupon Bolli delivered to her the said bills of exchange and the record of the said judgment, and the plaintiff then became and still was according to the laws of France entitled to the *364] benefit of all the rights of Bolli *upon the said judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for Bolli in all his rights against the defendant in respect of the said judgment; and that the defendant became indebted and liable to pay her the amount so paid by her upon the said judgment, with 6 per cent. interest thereon until payment. The count then goes on to allege that the plaintiff, having these rights, in order to keep alive the liability of the defendant, and to prevent the same from being barred by lapse of time, and in order to give effect to and enforce her claim against the defendant, took proceedings in the Tribunal Civil of the First Instance of the department of the Seine, and that thereupon, according to the practice and procedure of the said court, on the 2d of April 1862, by adjudication of the said court an injunction was made to the defendant to pay certain sums of money for principal, interest, and costs, and it was adjudged and notified to the defendant that he would be constrained to do so by all lawful means and by arrest of his body. That is the substance of the first count. The substance of the second count is, that certain bills of exchange were drawn upon the defendant by the deceased, and accepted by him, and dishonoured; that the deceased died, and the plaintiff was according to the laws of France the donee

(a) And see *Simpson v. Fogo*, 29 Law J., Ch. 657, on appeal, 32 Law J., Ch. 249.

of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts, claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the deceased upon [*365] the said bills became vested in the plaintiff, and she became [*366] entitled to sue the defendant thereupon in her own name and in her own right; and she demands payment of the amount thereof and interest. The ground of the demurrer to these two counts, is, that the plaintiff is in effect suing in a representative character, which she cannot do without having obtained letters of administration in this country. The allegation in both counts is, that, being donee of the universality of the personal and real estates belonging to the succession of her deceased husband, the plaintiff became according to the laws of France entitled to all the property and rights of the deceased absolutely in her own right, and not in any representative capacity. I am of opinion that that averment, if it were necessary to stand upon it, must be taken to be true, and so it appears upon the record that the law of France, in which country all the parties were domiciled, would give her a locus standi to sue there in her personal capacity. But it is not necessary to rest upon that. The first count shows, that, after the death of her husband, the plaintiff paid the amount due to Bolli in respect of the bills and the judgment; and that, it seems, would give her the right to sue in the courts of France in her own name and in her own right, as indeed it would in this country also. It has on many occasions been held that an executor or administrator has his election to sue either in his own right or in his representative character in respect of transactions arising since the death of the testator or intestate, although what is recovered would be assets in his hands. Here, the alleged cause of action is founded mainly upon what was done by the plaintiff after the death of her husband. There is a further answer to the demurrer to the first count, viz. that the rights of the plaintiff were confirmed by the second adjudication or injunction *obtained by her in the Tribunal Civil of the First [*366] Instance of the department of the Seine, which entitled her to execution against the defendant in that country. It seems to me, therefore, that there is abundant on the first count to show that the plaintiff has a good cause of action against the defendant in her individual capacity, without having recourse to the special matter before adverted to. As to the demurrer to the second count, it is clear that the plaintiff took the bills on the death of her husband, and, if nothing more appeared, she could only enforce them here by clothing herself with the character of his representative. But the law of domicile attaches to these parties; and there is a distinct averment that the plaintiff was, according to the laws of France, "the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts, claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the

plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was and is entitled to demand and sue for the same *in her own name and in her own right*, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and the plaintiff became entitled to sue the defendant thereupon *in her own name and in her own right*." I think it sufficiently appears upon this record that the plaintiff was entitled to sue upon these bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the law of France rights different from those which an executor or an administrator has in this country. I am therefore of

*367] *opinion that the plaintiff is entitled to our judgment upon the demurrers to both counts of the declaration.*

There are then several pleas which have been demurred to. The first of these, the first plea upon the record, which alleges that the said bills of exchange were not drawn at Orleans, is clearly bad. The eleventh plea, to the first count, states that the sums alleged to be due by virtue of the said judgment and injunction, and under the circumstances in the count mentioned, would, according to the laws of France, form part of the succession of the deceased, and be assets in the hands of the plaintiff as such donee of the universality of the real and personal estates belonging to the succession of the deceased, to be administered; such donee being, according to the said laws, the representative of the deceased in France, and entitled to the said sums of money in her representative character, and not otherwise. That which I have already said as to the plaintiff's right to maintain the action in her own name, when dealing with the first count of the declaration, and as to her rights in respect of the second adjudication, in the Tribunal Civil of the First Instance of the department of the Seine, seems to me equally to afford an answer to this plea, and to entitle the plaintiff to judgment upon the demurrer thereto. The twelfth plea, to the first count, alleges that the judgment in the first count mentioned was a judgment by default for want of an appearance by the defendant in the Court of the Tribunal of Commerce, and by the law of France would become void as of course on an appearance being entered. I apprehend that every judgment of a foreign court of competent jurisdiction is valid, and may be the foundation of an action in our courts, though subject to the contingency, that, by adopting a certain course,

*368] *the party against whom the judgment is obtained might cause it to be vacated or set aside.* But, until that course has been pursued, the judgment remains in full force and capable of being sued upon. The plaintiff, therefore, must have judgment on the demurrer to this plea. The answer set up by the thirteenth plea (also to the first count), is, that the Court of the Tribunal de Commerce was not a court of competent jurisdiction according to the French law, because the defendant was not a trader when he accepted the bills, and because the bills falsely purported to be drawn at Orleans, whereas they were not drawn there, nor was the drawer domiciled there at the time the bills were drawn. But I am of opinion that the judgment of a foreign court is valid if the court has jurisdiction over the person and over the subject-matter of the action: and it seems to me upon this plea

that the Court of the Tribunal de Commerce had jurisdiction over the subject-matter of the suit in which the judgment was obtained, viz., the liability of the acceptor of a bill of exchange, and that, if it were matter of defence that the defendant was not a trader or not resident within the jurisdiction of the court, it was a matter which ought to have been set up by way of defence in that court, and cannot avail the defendant in an action upon the judgment here. The definition of a "trader" according to the French law may be very different from that of a trader according to our law. So, as to the question whether or not Vanquelin resided at Orleans when the bills were drawn,—that also might have been tried and disposed of in the court there. The force and validity of a foreign judgment, and the grounds upon which it may be impeached in the courts of this country, are well laid down in the case of *The Bank of Australasia v. Nias*, 16 Q. B. 717 (E. C. L. R. vol. 71), where Lord Campbell, in delivering the judgment of the court (p. 737) says: "If the judgment was given by a court *in foreign country, or in a court of one of our colonies governed by a foreign law, how is the cause to be re-tried [369 at nisi prius? In the absence of direct authority, it gives us great satisfaction to think that Lord Denman seems to have taken the same view of the subject in *Ferguson v. Mahon*, 11 Ad. & E. 179 (E. C. L. R. vol. 39), 3 P. & D. 143, and still more distinctly in *Henderson v. Henderson*, 6 Q. B. 288 (E. C. L. R. vol. 51)(a) where he intimates a clear opinion that 'a plea to an action on the judgment of a colonial court ought to steer clear of an inquiry into the merits of the case; for, whatever constituted a defence in that court ought to have been pleaded there.'" The sixteenth plea, to the second count, is, that the plaintiff is not executor or administrator of Vanquelin, deceased. For the reasons before given in dealing with the second count, I think, that, as the plaintiff is the donee of the universality of the personal and real estates belonging to the succession of the deceased, and became thereby entitled to all debts, &c., to which he was entitled, which by the French law became vested in her personally and absolutely in the same manner as they were vested in him, and she was entitled in France to demand and sue for the same in her own name and right, it is quite immaterial whether or not she was executrix in this country. The eighteenth plea, which is pleaded to both counts, states that the deceased and the defendant, in France, agreed to purchase for their joint benefit a debt due to one Madame de Querecque, and charged upon certain property in France; that it was agreed between them that the deceased should advance the purchase-money, and that the defendant should accept the bills in the declaration mentioned as a security to the deceased in case the debt should not realize the amount of the purchase-money; that, except as aforesaid, there was *never any value or consideration for the acceptance of [370 the bills; that the deceased recovered a large sum in respect of the said debt, and retained the same; and that the share thereof belonging to the defendant and so retained by the deceased, was more than sufficient to satisfy the claim of the deceased in respect of the said judgment and bills. The effect of this plea is, that this is an action by the drawer of an accommodation bill against the acceptor,

(a) And see *Henderson v. Henderson*, 11 Q. B. 1015 (E. C. L. R. vol. 63).

and that there was no value or consideration for the acceptance. It seems to me that the answer to that plea, so far as it is pleaded to the first count, is, that the satisfaction is alleged to have accrued in the lifetime of the plaintiff's husband, and that the money in respect of which she is suing was paid by her since his decease. As to the first count, therefore, the plea fails: but, as to the second count, it appears to me that the eighteenth plea affords no answer.

The result is, that, in my opinion, the plaintiff is entitled to judgment upon all the demurrers, except as to the eighteenth plea; and that, as to so much of that plea as is pleaded to the first count, there should be judgment for the plaintiff, and, as to so much as is pleaded to the second count, judgment for the defendant.

WILLIAMS, J.—I am of the same opinion. As to the first count, I think our judgment on the demurrer thereto ought to be for the plaintiff. I do not consider, that, in so holding, the court will in any way depart from or diminish the effect of the rule which has been established by a long series of cases as well at law as in equity upon this subject, viz. that, in order to entitle a party to sue in any court in this country, whether of law or of equity, in respect of the property *871] or the personal rights of a deceased person, he must *show that he has obtained probate or letters of administration from the proper court of this country. That rule was recognised by Lord Cottenham in *Tyler v. Bell*, 2 Mylne & Cr. 89, and *Price v. Dewhurst*, 4 Mylne & Cr. 76; and also by the Exchequer Chamber in *Whyte v. Rose*, 3 Q. B. 498, 507 (E. C. L. R. vol. 48), 2 Gale & D. 812, where Tindal, C. J., in delivering the judgment of the court, distinctly says,—"It is well established, that, in order to sue in any court of this country, whether of law or equity, in respect of the personal rights or property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper spiritual court of this country: see the judgment of Sir John Nicholl in *Spratt v. Harris*, 4 Hagg. Eccl. R. 405; and see also the judgment of the Lord Chancellor in *Price v. Dewhurst*." That rule so established is also recognised in the United States of America, as appears from a note by Mr. Troubat to his edition of Williams on Executors. But that learned author goes on to say (and I agree with the qualification) that the rule does not apply unless the party is suing in right of the deceased. Applying those principles to the first count, it appears to me to be plain that the right which the plaintiff is there seeking to enforce is not a right which the deceased ever had. It was not a personal right which formed part of his estate at the time of his death: but it was a right which was acquired by the plaintiff herself since her husband's death. It was a right which was compounded of a payment made by her and a judgment obtained by her in a court of competent jurisdiction in France since his death. The right, therefore, which she is seeking to enforce by that count is not one which was ever vested in the deceased or which could form part of his estate, but a right which the plaintiff herself had acquired, and which she was entitled to assert in her own *872] name and in her own *individual capacity. These considerations do not apply to the second count. As to that I must confess I feel some difficulty: but, as my Lord and my Brother Keating have come to the conclusion that this count is capable of being construed

in a way to which I will presently advert, I do not feel justified in differing from them, though I cannot help entertaining some doubt as to whether that is the proper construction to put upon it. There is no doubt that by the law of this country property which a man takes as executor may be so dealt with by him as to become his own. This was established so long ago as the case of *Merchant v. Driver*, 1 Saund. 307, where it is said, that, "if an administrator, &c., pay with his own money the debts of the intestate, &c., in such order as the law appoints, to the value of all the goods, he may lawfully dispose of the goods as he pleases, and it will not be a *devastavit*." He becomes in fact the purchaser of the goods. Now, here, the second count contains an averment, that, on the death of her husband, the plaintiff was according to the law of France the donee of the universality of the personal and real estates belonging to the succession of the deceased, and *thereupon* became entitled to all debts, claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased, and that the plaintiff was and is entitled to demand and sue for the same in her own name and in her own right. Now, the construction which the rest of the court put upon that, is, that it appears that the plaintiff has, by some course of conduct and proceeding which is not (and need not be) particularized in the declaration, herself become according to the law of France the owner of these *rights, and may enforce them, by reason of her [*373] undergoing personal and individual liability in respect of them. I must confess I was strongly impressed with the notion that this was only a disguised averment framed with a view to evade the rule which requires administration in order to entitle a party to sue in respect of the personal rights or property of a deceased person, but in substance amounting to no more than a statement that the plaintiff was the legal personal representative of her deceased husband. But I am disposed to assent to the view taken by my Lord and my Brother Keating, viz. that it does amount to an averment, that, according to the law of France, the plaintiff, by reason of the liability which her relation to the deceased's property entailed upon her, acquired a personal and individual right to enforce this claim, and need not clothe herself with the character of his personal representative. With respect to the observations which my Lord has made upon the several pleas demurred to, it is enough for me to say that I fully concur in them.

KEATING, J.(a)—I am of the same opinion. I entirely agree with all the observations which have been made by the Lord Chief Justice upon the first count of the declaration. As to the second count, it must not be supposed that there is any difference amongst the members of the court as to the rule which governs the mode of enforcing personal rights or claims to property of deceased persons. That rule is well established, and nothing in this judgment is intended to shake it. But I agree with my Lord that the second count does sufficiently show upon the face of it, that, according to the law of France, the plaintiff was entitled (in France) to this succession, and to sue in

(a) Byles, J., was absent on account of indisposition.

*374] respect of it in her *own name and in her own right. It seems to me that that is alleged in the count with sufficient distinctness, and that it is admitted by the demurrer. I also entirely agree with what has been said with regard to the pleas. At first I was disposed to think that the thirteenth plea presented some difficulty: but I think the distinction pointed out by Mr. Smith is well founded. The judgment of a foreign court may undoubtedly be impeached in our courts for want of jurisdiction, but not by the denial of any facts which it was competent to the foreign court to try and which that court may have decided on the merits. Now, the facts alleged in the thirteenth plea clearly would have been properly triable in the French court. We must assume that they were tried there; and we cannot re-try them here according to the laws and customs of another country. I think also that the plea is very loosely framed, and that it does not contain any distinct allegation that the facts therein stated would have deprived the French court of jurisdiction in the matter. It is unnecessary, however, to go into that. The result will be as my Lord has already stated. Judgment accordingly.

Hodgson, on behalf of the defendant, asked leave to add a plea traversing the law of France as to the matters alleged in the second count.

ERLE, C. J.—We recommend your opponent to assent to that. You will no doubt arrange it with Mr. Williams.

*375] *Re ALDINGTON and HANCOX and CHESHIRE
Nov. 22.

Upon a submission to arbitration between two individuals (not being partners in trade) and a third party, where the agreement of reference is signed by one of them thus,—“A. for self and B.”—on making the submission a rule of court, it must be shown by affidavit that A. had the authority of B. to sign for him.

NEEDHAM moved to make a submission to arbitration a rule of court pursuant to the 17th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. The officer had declined to draw up the rule without the direction of the court, on the ground that the agreement of reference did not appear to have been signed by Hancox or with his authority,—the executing parties being Chesshire and “Thomas Aldington for self and John Hancox.” Aldington and Hancox were not partners in trade, but were interested in the subject-matter of the reference as trustees. Aldington and Chesshire appeared before the arbitrator, but it did not appear that Hancox had. The award had been made against Chesshire. The learned counsel submitted that there was no distinction between this and any other description of agency; and that Hancox might ratify the act of Aldington at any time, and, the award being in his favour, there could be no doubt of his doing so. [BYLES, J.—Under the 9 & 10 W. 3, c. 15, s. 1, an affidavit of the due execution of the agreement of reference was required. The words of the 17th section of the Common Law Procedure Act, 1854, are more comprehensive.]

ERLE, C. J.—Get an affidavit of Aldington or of Hancox stating

that Aldington was authorized by Hancox to sign the agreement of reference for him; and then it may pass.

An affidavit of Hancox was afterwards produced to the proper officer, stating, "that the action out of which the agreement of reference arose had his sanction *and approval, and that Thomas [376 Aldington in signing the agreement for himself and the deponent acted therein for the benefit of their joint interest, and as the deponent's agent, and that the agreement had his sanction and full concurrence," and the submission was accordingly made a rule of court.

BAIRD and Others v. WILLIAMSON and Others. Nov. 13.

The owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner for the purpose of getting out the minerals in any part of his mine; and he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted. But he has no right by pumping or otherwise to be an active agent in sending water from his mine into the adjoining mine.

THIS was an action by the owners of a mine against those of an adjoining mine for so working as to flood the mine of the plaintiffs.

The first count of the declaration stated, that, before and at the time of the committing of the grievances by the defendants as thereinafter in that count mentioned, the plaintiffs were possessed of a certain ironstone mine lying and being in a certain vein or seam of ironstone called the red shagg ironstone seam, [which was a stratum of such a nature as to allow water to percolate and pass through it, as the defendants then well knew]; (a) and the defendants before and at the time aforesaid were also possessed of certain ironstone mines lying and being in the same vein or seam near and adjoining to the said mine of the plaintiffs, but being on a higher level than the said mine of the plaintiffs, so that the water introduced *into the [377 said vein or seam in the defendants' said mines would run down from the same and pass into the plaintiffs' said mine from the said mines of the defendants, the stratum or floor on which the said vein, seam, and mines lay being impervious to water, and by means thereof, and of the dip or inclination thereof, preventing such water from escaping deeper into the earth or otherwise than into the plaintiffs' said mine, as the defendants then [also] well knew: Yet that the defendants, intending to escape the expense of themselves raising to the surface of the earth the water next thereinafter mentioned, and to throw that expense upon the plaintiffs, by means of certain pumping-engines and of certain cruts or openings made by them between the said stratum of ironstone and divers lower strata in the earth in which large quantities of water arose, and in divers whereof the defendants were then working or preparing to work the mines, wrongfully introduced and threw into their said first-mentioned mines great quantities of water arising in and coming from the said lower strata, and such water ran down from such mines of the defendants to the

(a) The words within brackets were after the demurrers were disposed of struck out, and these in the foot-notes inserted in the various parts of the pleadings by arrangement between the parties: and the second plea and the demurrer thereto were struck out of the record.

boundary of the [plaintiffs' portion of the said stratum of ironstone], (a) and passed into and through the same and into the said mine of the plaintiffs,—by means whereof the plaintiffs were hindered and prevented from working their said mine so conveniently and profitably as they otherwise might and would have done, and were put to great expense in pumping and raising the said water from their said mine to the surface of the earth.

The second count stated, that, before and at the time of the committing of the grievances by the defendants as thereafter in that count mentioned, the plaintiffs were possessed of a certain other ironstone mine lying and being in a certain vein or seam of *378] ironstone called the red mine ironstone seam [which was a stratum of such a nature as to allow water to percolate and pass through it, as the defendants then well knew]; and the defendants before and at the time last aforesaid were also possessed of certain other ironstone mines lying and being in the same vein or seam near and adjoining to the said last-mentioned mine of the plaintiffs, but being on a higher level than the said last-mentioned mine of the plaintiffs, so that water introduced into the said last-mentioned vein or seam in the defendants' said last-mentioned mines would run down from the same and pass into the plaintiffs' said last-mentioned mine from the said last-mentioned mines of the defendants, the stratum or floor on which the said last-mentioned vein, seam, and mines lay being impervious to water, and by means thereof, and of the dip or inclination thereof, preventing such water from escaping deeper into the earth or otherwise than into the plaintiffs' said last-mentioned mine, as the defendants [also] then well knew: Yet that the defendants, intending to escape the expense of themselves raising to the surface of the earth the water next thereafter mentioned, and to throw that expense upon the plaintiffs, by means of certain pumping-engines and of certain cruts or openings made by them between the said last-mentioned stratum of ironstone and divers lower strata in the earth in which large quantities of water arose, and in divers whereof the defendants were then working or preparing to work the mines, wrongfully introduced and threw into their said mines in this count first mentioned great quantities of water arising in and coming from the said lower strata, and such water ran down from such last-mentioned mines of the defendants to the boundary of the plaintiffs' [portion of *379] the said last-mentioned stratum of ironstone], (b) and passed *into and through the same, and into the said last-mentioned mine of the plaintiffs,—by means whereof the plaintiffs were hindered and prevented from working their said last-mentioned mine so conveniently and profitably as they otherwise might and would have done, and were put to great expense in pumping and raising the said water from and out of their said last-mentioned mine to the surface of the earth.

Second plea, to the first and second counts respectively, that the said veins or seams of ironstone in those counts respectively mentioned were not respectively strata of such a nature as to allow water to percolate and pass through them respectively, nor could water introduced into the said veins or seams respectively in the de-

(a) said mine.

(b) said last-mentioned mine.

defendants' mines in those counts respectively mentioned run down from the same and pass into the said mines of the plaintiffs in those counts respectively mentioned, as in those counts respectively alleged.

Third plea, to the first and second counts respectively, that the said cruts or openings in those counts respectively mentioned were made by them as in those counts respectively mentioned, for the purpose of reaching the said lower strata in the earth, and of working, getting, and winning the mines and minerals of them the defendants situate in the said lower strata respectively, and not for any other purpose, and were so made by them according to the usual, proper, and recognised manner and course of mining, and were so made with all due care in that behalf; that the said great quantities of water in those counts respectively alleged to have been introduced and thrown by the defendants into their said mines in those counts respectively mentioned, by means of the said cruts or openings and of certain pumping-engines, were certain quantities of water which ran, flowed, [*380 and passed by, through, and along the said cruts or openings from the said lower strata respectively to and into the said other mines of the defendants by gravitation and by the action of other natural forces independently and irrespectively of any pumping or drawing of the same by the defendants; and that the said water afterwards ran and passed from the said last-mentioned mines of the defendants to and into the said mines of the plaintiffs in those counts respectively mentioned underground, by natural percolation through the strata of the said last-mentioned mines of the defendants and the plaintiffs respectively, and not otherwise.

The defendants also demurred to the first and second counts, the ground of demurrer alleged being "that those counts do not show any wrongful act done by the defendants, or any invasion by them of any right or easement to which the plaintiffs are entitled." Joinder.

The third count of the declaration stated, that, before the committing by the defendants of the grievances thereinafter mentioned, the defendants were possessed of divers mines and strata of ironstone lying in and under certain land, which strata were called the red shagg ironstone and the red mine ironstone, and also of divers other mines and strata of minerals lying under the said mines and strata of ironstone in that count mentioned; and the defendants, for the purpose of getting rid of the water from the mines and strata so as aforesaid lying under the said ironstone, made certain cruts or communications between the said lower strata and the said strata of ironstone, and thereby and by means of pumping and otherwise conducted, raised, and introduced great quantities of the water arising in the said lower strata into the said mines and strata of ironstone of which the defendants *were possessed as in that count before mentioned, [*381 and conducted such water to certain reservoirs at the foot of a certain pumping-pit of the defendants, from and out of which the defendants by means of certain engines and pumps raised the said water through the said pumping-pit to the surface of the earth, and there discharged it, and by that means cheaply and conveniently to themselves carried on their works and got rid of the water from the said lower strata: that afterwards, and while the defendants were getting rid of the said water from the said lower strata by the means and sys-

tem aforesaid, the plaintiffs were possessed of parts of the said two strata of ironstone adjoining to the parts thereof so possessed by the defendants as in that count before mentioned, and, being so possessed, worked mines therein and got out thereof large quantities of ironstone, and thereby left large unfilled hollows or spaces in their said mines and parts of the said strata of ironstone: that the said strata of ironstone were of such a nature that water could not be kept from passing from one excavated part thereof to any other by means of a barrier, but were pervious to water, which would and did readily pass through the same, as the defendants at and before the time in that count aforesaid well knew: that the inclination of the said strata was upwards from the plaintiffs' to the defendants' portion thereof, and that the strata or floors on which the said veins or seams of ironstone rested were impervious to water, so that water introduced into the defendants' portion of the said strata of ironstone did not nor would sink into the earth, but descended towards the defendants' said portion thereof, and when the pumps of the defendants at their said pumping-pits were stopped, such water would rise above the said reservoirs and *382] in the defendants' mines against the boundary of the *plaintiffs' said portions of the said seams of ironstone, and would escape through the same into the plaintiffs' said mines, and fill the same and the said hollows and spaces,—all which the defendants well knew before and at the time of committing the said grievances in that count mentioned: Yet that the defendants, intending to escape the expense of themselves raising to the surface of the earth the water from the aforesaid lower strata, and to throw that expense upon the plaintiffs, after the plaintiffs had begun to work and whilst they were working their said mines of ironstone, wrongfully continued to introduce in manner aforesaid the water from the said lower strata into their said strata of ironstone, and wrongfully discontinued to work their pumps at the said pumping pit or otherwise to raise the said water which they so continued to introduce as aforesaid to the surface of the earth, and allowed the same to rise above the levels of the said reservoirs, and above the levels of the plaintiffs' said boundaries, and to pass into the plaintiffs' said mines and the hollows and spaces aforesaid, whereby the same were filled and overflowed, and the plaintiffs were unable to work their said mines so conveniently and advantageously as they otherwise might and would have done, and were put to great expense in pumping and otherwise getting rid of the said water from their said mines.

Fifth plea, to the third count, that the said cruts and communications in that count mentioned were made by the defendants for the purpose of reaching the said lower strata, and of working, getting, and winning the mines and minerals of them the defendants, situate in the said lower strata, and not for any other purpose, and were so made by them according to the usual, proper, and recognised manner and course of mining, and were so made with all due care in that *383] behalf; *and that the said great quantities of water in that count alleged to have been conducted, raised, and introduced into the said mines and strata of the defendants as therein mentioned, and to have been conducted to the said reservoirs by means of the said cruts or communications, and of pumping and otherwise, were

certain quantities of water which ran, flowed, and passed by, through, and along the said cruts or communications from the said lower strata respectively to and into the said other mines and strata of the defendants in that count mentioned, by gravitation and other natural forces independently and irrespectively of any pumping or drawing of the same by the defendants.

The defendants also demurred to the third count, the ground of demurrer alleged being the same as that alleged for demurrer to the first and second counts. Joinder.

The plaintiffs demurred to the second plea on the ground that, "even if there was no barrier at all left by the plaintiffs, the defendants cannot justify the introduction of foreign water into the mines." Joinder.

The plaintiffs also demurred to the third and fifth pleas, the ground alleged being, "that, although the mode adopted be a proper and recognised mode of mining, it will not justify the introduction of foreign water into a vein of mineral, when it damages an adjoining mine belonging to another owner in the same vein." Joinder.

The plaintiffs also new-assigned that they sued not only for the grievances in the third and fifth pleas admitted, but also for similar grievances in respect of water which ran, flowed, and passed by, through, and along the said cruts or openings from the said lower strata respectively to and into the said other mines of the defendants by means of pumping and drawing the same by the defendants.

*The defendants pleaded to the new-assignment,—first, not guilty,—secondly, that the said cruts or openings in the new-assignment mentioned were made by them for the purpose of reaching the several lower strata in the earth in the several counts of the declaration mentioned, and of working, getting, and winning the mines and minerals of them the defendants situate in the said lower strata respectively, and not for any other purpose, and were so made by them according to the usual, proper, and recognised manner and course of mining; that, after the same had been so made, the defendants were engaged in working, getting, and winning certain parts of the said mines and minerals of them the defendants situate in the said lower strata, and were so working, getting, and winning the same according to the usual, proper, and recognised manner and course of mining; that, in the course and for the purpose of such last-mentioned working, getting, and winning, it became and was necessary for the defendants to pump and drain away the water in the said new-assignment mentioned from the said last-mentioned parts of the said mines and minerals, and the defendants did accordingly pump and drain away the said water; that, by reason of such pumping and draining, the said water ran, flowed, and passed by, through, and along the said cruts and openings into certain other parts of the mines of the defendants, that is to say, the several upper strata in the declaration mentioned; and that the said water afterwards ran and passed from the said last-mentioned mines of the defendants to and into the mines of the plaintiffs underground by natural percolation through the strata of the said last-mentioned mines of the defendants and of the plaintiffs respectively, and not otherwise,—which were the grievances above newly-assigned. [*384]

*385] The plaintiffs demurred to the second plea to the *new-assignment, the ground of demurrer alleged being, "that, although it be a usual, proper, or recognised mode of mining, it will not in law justify pumping foreign water into a vein of mineral, when it damages an adjoining mine belonging to another owner in the same vein." Joinder.

John Gray, Q. C., for the plaintiffs.(a)—Neither of the pleas in question affords any answer to the plaintiffs' complaint. The defendants clearly had no right by making cruts to alter the natural flow of the water from their mine, and cause it to flow into the plaintiffs' mine: still less had they a right to do so by raising the water by artificial means from the lower to the upper part of their mine, and thereby increase the natural flow into the mines of the plaintiffs. The general expressions thrown out by the Court in *Smith v. Kenrick*, 7 C. B. 515 (E. C. L. R. vol. 62), do not affect this case: nor do the cases of *Acton v. Blundell*, 12 M. & W. 324, or *Chasemore v. Richards*, 2 Hurlst. & N. 168, 7 House of *Lords Cases 349, apply.

*386] The Lord Chancellor, in the last-mentioned case, puts it very much as *Tindal, C. J.*, did in giving the judgment of the Exchequer Chamber in *Acton v. Blundell*, where it was held that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. "We think," said the Chief Justice, "the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that, if in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action." It is no answer to the plaintiffs' complaint for the defendants to say that what they have done was done in the usual and ordinary course of good mining.

H. James (with whom was *Horace Lloyd*), contra.(b)—The pleas

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. The first and second counts each shows a cause of action, by showing that the defendants introduced into the veins water not naturally arising in the veins, but coming from other sources, knowing that such water would find its way into the plaintiffs' mines:

"2. That the manner in which the water finds its way into the plaintiffs' mines is immaterial, whether by percolation through a barrier or from the absence of any barrier, if the water be foreign water not naturally arising or finding its way into the vein, and therefore the second plea is bad:

"3. That the third and fifth pleas and the second plea to the new-assignment are bad, on the ground that, although the mode adopted by the defendants be a proper and recognised mode of mining, it will not justify the introduction of foreign water into a vein of mineral, where it damages an adjoining mine belonging to another owner in the same vein of mineral."

(b) The points marked for argument on the part of the defendants were as follows:—

"1. That the first, second, and third counts of the declaration are respectively bad in sub-

allege that the defendants have *done no more than work their mine according to the usual and approved course of mining in the district. They had an undoubted right to get all the ironstone from their mine, regardless of the natural consequences which might result from their so doing. That is the effect of the judgment of this court in *Smith v. Kenrick* and of the Exchequer Chamber in *Acton v. Blundell*. The only obligation which the law imposes upon the defendants, is, that, in working their mines, they shall not be guilty of negligence, or wilfully damage *the plaintiffs' mine. [ERLE, C. J.—The defendants in working their mine had no right to interfere with the natural flow of the water. If by gravitation it will go away, so be it: but they must not direct it.] The cruts were not made for the purpose of conducting the water in a given course, but for the purpose of getting the ore in the most convenient manner. *Smith v. Kenrick* distinctly lays it down that the rights and duties of one mine-owner are wholly independent of the working of his mine by an adjoining owner. In delivering the judgment of the court there, Cresswell, J., says,—7 C. B. 564 (E. C. L. R. vol. 62),—"Treating the question as a new one, not governed by the authority of any decided case,—for, all those referred to are distinguishable,—it would seem to be the natural right of each of the owners of two adjoining coal-mines,—neither being subject to any servitude to the other,—to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine; so long as that does not arise from the negligent or malicious conduct of the party." [ERLE, C. J.—It can hardly be necessary to say that there is no such thing as a wrong, without pre-supposing a right which is violated.] There is greater difficulty in the question, undoubtedly, where artificial means are resorted to for the purpose of raising the water to a spot where it would not otherwise have flowed. But there is no allegation of improper mining here. On the contrary, it is averred by the pleas, and admitted by the demurrers, that what the defendants

stance, and that none of them show any invasion by the defendants of a legal right existing in the plaintiffs, or any good cause of action against the defendants:

"2. That, at any rate, the second, third, and fifth pleas are respectively good and valid answers to the counts to which they are respectively pleaded, and are respectively good in substance:

"3. That the new-assignment of the plaintiffs to the third and fifth pleas respectively is bad in substance, and that the additional facts therein stated make out no cause of action by the plaintiffs against the defendants:

"4. That the second plea to the new-assignment is good in substance, and is a good and valid answer to the new-assignment:

"5. That the defendants are at liberty to drain, draw, pump, or otherwise remove water from one part of their own mines to another part in whatever manner they may think fit, and are not liable if by reason thereof such water should percolate through strata pervious to water into the mines of the plaintiffs, and cause damage there:

"6. That, at any rate, the defendants are not liable for such consequences, if such draining, drawing, pumping, or otherwise removing of the water within their own mines be done solely for the purpose of mining, and in the usual, proper, and recognised manner and course of mining:

"7. That, at any rate, the defendants are not liable for such consequences, if they do not draw or pump such water from one part of their mines to another part, but the water runs and flows within their mines from one part to the other by gravitation and other natural forces along passages and openings made solely for the purpose of mining, and in the usual, proper, and recognised manner and course of mining."

did was done in the usual and accustomed course of good mining. The substantial causes of complaint alleged in the declaration and in the new assignment are all answered by the pleas.

*889] *Gray*, in reply.—As to the flow of water by means *of the cruts, it is true that it is alleged that the cruts were made for the more convenient working of the defendants' mine; but enough is not alleged to constitute a defence. [BYLES, J.—The allegation is, that the defendants committed no trespass, and that they did what they did in the usual and proper course of mining.] As to the pumping up the water from the lower level, and so causing it to flow into the plaintiffs' mine, it is distinctly charged in the declaration and new-assignment, and not denied or excused by anything that is alleged in any of the pleas. The following authorities were referred to,—*The Duke of Beaufort v. Morris*, 6 Hare 340; *Yool on Waste* 136; and *Bainbridge on Mines* 486. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court: (a)—

In this case the plaintiffs complained of the flow of water into their mine from the defendants' mine. The defence was, that the flow arose from mining works carried on with due skill, in a customary and proper manner. As the complaint related to three kinds of foreign water, the questions raised may be better understood by a short description of the local relation of the two properties, which was agreed to be the effect of the pleadings. The two mines adjoined. The defendants' was the upper, the plaintiffs' the lower mine. In each mine were two seams of ironstone, distant a few fathoms from each other. Each seam cropped out on the surface of the defendants' land, and extended with a parallel dip down through the defendants' land into and through the plaintiffs' land. Each party had worked out the *390] upper of the two seams of *ironstone, which we call No. 1; and the plaintiffs had left no barrier to stop back the water flowing down from the defendants' works in that seam; and of this water the plaintiffs did not complain, it being very clear, from *Smith v. Kenrick*, 7 C. B. 515 (E. C. L. R. vol. 62), that no complaint could be sustained. In order to get the mineral in the seam which we call No. 2, the defendants made a crut or passage from the first seam to the second seam, so constructed as to be on an incline from a part of the seam No. 2 to a part of the seam No. 1. Although No. 2 lay under No. 1, yet the head of the crut in No. 2 was at a higher level than the mouth of the crut in No. 1. This crut was made in the usual course of skilful mining, for the purpose of getting the minerals. The defendants' counsel explained it to be for the purpose of conveying minerals from the seam No. 2 down the crut to the seam No. 1, and down that seam to the shaft therein, so as to be raised to the surface. While the crut effected that purpose, at the same time the water from the works in the seam No. 2 flowed down through it into the seam No. 1, and so onwards into the plaintiffs' mine.

One complaint of the plaintiffs was of this water; and they contended that they were not obliged to receive through seam No. 1 more water than that which flowed from the works therein, and might maintain their action in respect of the water so flowing from the seam

(a) The judges present at the argument were, Erle, C. J., Williams, J., Byles, J., and Keating, J.

No. 2: but on this point we think that the plaintiffs fail. The owners of the higher mine have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so conducted. We think that the law was correctly laid down to that effect in *Smith v. Kenrick*. If this crut had been made for the *purpose of turning water into the plaintiffs' mine which would not otherwise have arrived there, and not for the purpose above described, we consider that the action would lie. It appears in *Smith v. Kenrick*, where the barrier of the lower mine had been wrongfully pierced for air-holes by a former occupier of the upper mine, that a subsequent occupier of the upper mine had no right to make a construction at his lower boundary for the sole purpose of turning some of his water through these openings. By paying money into court in an action for that wrong, he admitted that his exemption from liability was confined to the water which flowed by the laws of nature into the plaintiffs' mine from works conducted for the purpose of getting minerals. [*391]

The plaintiffs further complained of other foreign water which had flowed into their mine. This water is alleged in these pleadings to be raised by pumping to a level trough and to cause such a flowing. The counsel described the pumping to be for the purpose of getting other mineral, lying deeper than the two seams above mentioned; and the pump was so placed that a crut led therefrom to the head of the crut above mentioned, at such a level as that the water from the pump flowed down the two cruts into seam No. 1, and so into the plaintiffs' mine. In respect of this water, we think that the action lies.

The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. The plaintiffs, as occupiers of the lower mine, are subject to no servitude of receiving water conducted by man from the higher mine. Each mine-owner has all rights of property in his mine, and, among them, the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine *exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine, to bay back the water of his higher neighbour. The law imposing these regulations for the enjoyment of somewhat conflicting interests, does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine or advantageous to himself. [*392]

This appears to us to be the law. For authority, we refer both to *Smith v. Kenrick* and also to the question left to the jury in *Acton v. Blundell*, 12 M. & W. 324.

The judgment will therefore be for the plaintiffs on the demurrer to the declaration and to the plea to the new-assignment, and for the defendants on the demurrer to the other pleas.

Judgment accordingly.

WHITELEY v. ADAMS. Nov. 23.

A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has, or honestly believes he has, a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminal matter, which, without this privilege, would be slanderous and actionable.

A., a well-esteemed member of a congregation in London notorious for its extreme high-church notions, being on a visit to a Mrs. H. (also a member of the same congregation), who was residing for a time at S., in Berkshire, was by her introduced to B., the rector of the parish, a gentleman of similar religious tendencies. The latter introduced A. to one of his parishioners, a farmer named F., with whom A. soon became on terms of intimacy, staying on several occasions at F.'s farm with different members of his family. After the lapse of some months, F., conceiving that he had ground of complaint against A. with regard to some private transactions which he communicated to B., brought an action against A. for board and lodging and the price of a horse which he alleged had been bought of him by A. A. resisted the claim as to the board and lodging on the ground that he and his family had resided at F.'s farm as guests and not as lodgers, and the claim as to the horse on the ground that he had only taken it upon trial.

In this state of things, one C., one of the curates of the London congregation, wrote to B. asking him to consent to act with him as arbitrator in the dispute between F. and A. B. declined; whereupon C. again wrote to him, urging it upon him as a sacred duty to aid in averting what he called a scandal from a member of his (C.'s) congregation. In reply to this letter, B. wrote to C. giving him his reasons for declining to act as arbitrator, imputing to A. very gross misconduct, and adding, "I think it my duty to unmask him to you."

This letter having been handed by C. to A., and the latter having commenced an action for a libel against B., B. came to London, and called on Mrs. H., to whom he detailed some of the charges against A. That lady intimated her conviction that B. was mistaken in his opinion of A., but said she would see him on the subject and communicate with B. the result, adding that she was quite sure A. would tell her the truth. Mrs. H. afterwards wrote to B. (with A.'s knowledge), telling him that A. denied all the charges alleged against him, and reiterating her confidence in A.'s integrity. B. thereupon wrote in answer to Mrs. H. substantially repeating the charges, saying, as to one of them, that there was not a shadow of doubt but that the complaint was correct, and that if A. denied it in the witness-box he would be indicted for perjury. This letter was also handed to A. (who, knowing it was coming, called on Mrs. H. for it), and a second action was the result.

The two actions having been consolidated, the jury at the trial found that the charges contained in the letters were unfounded, but that B. was not actuated by malice:—

Held, that both letters were privileged, on the ground that they were written by the defendant in what he believed to be the honest discharge of a social and moral duty, and on a subject-matter in which the writer had an interest in making the communications, and the persons respectively receiving them had an interest in the receipt of them,—Byles, J., confining his judgment, as to the second letter, to the latter ground.

Two actions for libel were brought by the plaintiff against the defendant.

*393] The declaration in the first action stated that the *defendant maliciously wrote and published of the plaintiff a letter containing the words, figures, and abbreviations following, that is to say, "Stockcross Parsonage, March 17th. Dear Sir,—I cannot, I am sorry to say, accede to your request, for the following reasons,—first, because Mr. Fowler's lawyer, Mr. Smale, whom I know to be an honourable man, will, I am sure, be quite ready to compromise the matter instead of carrying it into court, if Mr. Whiteley will make fair overtures to him,—secondly, because Mr. Whiteley's conduct has been so bad that I should be sorry to have my name in any way associated with him or his affairs. To give you an outline of all the charges which I hear laid against him would occupy more time than I have to spare this morning; but I will mention two or three which I believe to be well founded. Though only a lawyer's clerk, he passed himself off for some time in this parish as a lawyer of considerable wealth, and talked

largely about his landed property in Kent. This enabled him to impose on the rustic simplicity of the Fowlers in a way which he would not otherwise have done. Under the impression that [*394 *he was a gentleman of considerable means, they allowed him from time to time to make himself an unbidden guest at their house, and to send his son to stay with them for the benefit of his health for a month or two. They also sent him, at his request, poultry, &c., &c., and were given to understand by him that full compensation would be made to them for all the trouble and expense to which he had put them. But, with the exception of a shawl sent by Mrs. Whiteley to Mrs. Fowler, they have received no payment whatever. Last of all, he bought a horse of Mr. Fowler, which is not yet paid for; and his attempts to avoid payment have been characterized by extreme meanness, if not downright dishonesty. There are unpleasant rumours about his being immoral and intemperate: but, how far they are true, I am unable to say. It grieves me very much to make these statements respecting a man who evidently wishes to be considered a religious man and a good churchman: but, inasmuch as he said a great deal to my parishioners about his intimacy with the clergy of St. Barnabas, I think it my duty to unmask him to you; and I should be very thankful to be enabled to tell some of my neighbours that his position at St. Barnabas is not quite what he led them to suppose it to be, and especially that his official connection with the English Church Union had ceased,"—by means of the committing of which grievance, the plaintiff had been and was greatly injured in his character and credit, and brought into public scandal and disgrace, &c.

To this count the defendant pleaded not guilty, and a plea justifying the truth of the statements contained in the letter.

The declaration in the second action stated that the defendant falsely and maliciously wrote and published of the plaintiff a letter containing the words, *figures, and abbreviations following, that is [*395 say,—“Stockcross Parsonage, May 6th. My dear Mrs. Hurry, —Time will show whether I have been misinformed or not respecting Mr. Whiteley. A writ has been served upon me, and a public investigation must therefore take place. If he states on oath in the witness-box what he has stated to you, especially as to the charge of assault, he will be most certainly prosecuted for perjury; for, there is not a shadow of a doubt but that the complaint of the servant girl is correct. She is a person of unblemished reputation, and a communicant; and no one can listen to her statement, as I have done, without believing every word of it. As to the story about the farmer's wife and the beer-drinking at 10 o'clock on the Sunday morning, I do not attach much importance to it. They are charges of a very minor consideration: but the alleged assault is a very weighty accusation. I am sorry I shall not be able to call on you again for some time. Until the trial comes on I shall be hardly able to leave home: but, if you have any inclination to ask for further information and details, my attorney, Mr. Smale, will be happy to see you. With kind regards to Miss Hurry, sister Pauline, and yourself, believe me,” &c.,—by means of the committing of which grievance the plaintiff had been and was greatly injured in his character and credit, and brought into public scandal and disgrace, &c.

To this count the defendant pleaded,—first, not guilty,—secondly, that the plaintiff, being a married man, indecently assaulted the servant girl referred to in the said letter, and then indecently and dishonourably solicited her to permit an illicit and adulterous intercourse between the plaintiff and her, of which the said servant girl complained, and the plaintiff made a false statement to the person to whom the said letter was addressed with respect to the matter aforesaid; *396] *wherefore, and because the plaintiff had committed such matters as alleged, the defendant published the said alleged libel.

The actions were consolidated by a judge's order.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff held an inferior official appointment in the Chambers of Vice-Chancellor Wood, and was an apparently zealous and exemplary member of the congregation of St. Barnabas, Pimlico, whose peculiar notions of the christian doctrines are so well known. The defendant is the incumbent of the church of Stockcross, in the county of Berks. In the Spring of the year 1860, a lady named Hurry, who with her daughters took a great interest in all matters affecting the church and congregation of St. Barnabas, and who was on terms of intimacy with the plaintiff, resided for a few weeks at Stockcross. The plaintiff visited her there, and was by her introduced to the defendant. The defendant introduced the plaintiff to one Fowler, a farmer in moderate circumstances residing in his parish; and ultimately the plaintiff became an inmate at Fowler's farmhouse, and continued from time to time to visit him, staying at intervals with his wife and children there, and being supplied with board and lodging, without, as it afterwards turned out, any distinct understanding as to the relation in which the parties stood towards each other. Matters so remained until towards the close of the year 1861, when Mr. Fowler made a demand upon the plaintiff for board and lodging and also for the price of a horse which the plaintiff had brought to London with him; and ultimately Fowler brought an action against the plaintiff for those and other claims. This action was resisted by the plaintiff on the grounds that he and *397] his family had resided *at Fowler's in the character of a guest and not in that of a lodger, and that the horse had not been purchased by him, but only taken on trial. Whilst this action was pending, the Rev. Mr. Cleaver, who was one of the assistant-curates of St. Barnabas, wrote to the defendant (who it appeared was a gentleman whose religious notions coincided with those entertained by the members of St. Barnabas) to entreat him to use his influence with Fowler to allow the dispute between himself and the plaintiff to be settled by arbitration, and proposing to the defendant to act with him as arbitrators between them. The defendant to this letter sent an answer declining in general terms to interfere in the matter. The Rev. Mr. Cleaver thereupon wrote to the defendant again in strong terms urging him to accept the office of mediator, conjuring him as a christian minister to do his utmost to avert so great a scandal to the congregation of which he was a well-wisher, and pointing out to him the injurious consequences which might result from his refusal. Upon receipt of this letter, the defendant addressed to the Rev. Mr. Cleaver the letter which formed the subject of the first action,—and the gen-

tleman to whom it was addressed thought fit to hand it to the plaintiff.(a)

After the commencement of the first action, the defendant,—who had been informed by Fowler of conduct on the plaintiff's part, which, if true, was very disgraceful, and which had influenced the defendant in declining to take upon himself the office of arbitrator between them,—came to town and called upon Mrs. Hurry, and in conversation with her communicated some particulars of the plaintiff's alleged misconduct; amongst others, of an attempt on his part to invade *the chastity of a female servant in Fowler's employ. That lady expressed her strong conviction that the plaintiff was [*398 incapable of acting as he was represented to have acted, but said that she would see the plaintiff and ask him; adding that she was quite sure he would tell her the truth. Mrs. Hurry accordingly saw the plaintiff, and she afterwards (with the knowledge of the plaintiff) wrote to the defendant informing him that the plaintiff denied all that had been imputed to him.

Mrs. Hurry's letter was as follows:—

"Stone House, May 3d.

"My dear Mr. Adams,—I write to tell you that I feel confident that you have been misinformed about Mr. Whiteley. I have seen him, and told him what was standing against his character. He assured me that there is not the slightest foundation for what is reported of him. He positively asserts that he never drove from Newbury alone. After my telling him of the pretty farmer's wife, it brought to his recollection having driven from the market at Newbury with Mr. and Mrs. Fowler, when they overtook upon one of the hills a nice-looking woman carrying a great heavy baby in her arms, and looking fatigued to death. They stopped and took her up and drove her home, and had to go over such a bad bit of road to get into their way home, that Mrs. Fowler was frightened to death, and I believe got out. This circumstance marked it in his recollection: and he confidently states that that was the only circumstance which at all agrees with the report. As to the history of the maid servant, he denies the possibility, as he was never at home alone to his recollection. He always went to church in the morning and evening; and the maid servant always went in the evening. And as to the ale, he often took a glass of ale with the old Mr. Cook, but certainly *not three tumblers [*399 before church. He does not remember ever having gone in there before church; but he cannot say that he never went there and during his visit took three glasses of ale, but certainly not before church. I wish I could disabuse your mind respecting that young man. We have always seen and believed so differently of him. And I think, that, if he had been guilty of indiscretion, he would not deny it to me when I spoke quietly to him. Nothing can convince me of his insobriety. He has always been such a very different character. I wish, dear Mr. Adams, that you would speak of him to the three nice women (sisters) who live just beyond the blacksmith's. He lodged there all the time he was with us, if he were of such a depraved and unsteady character. I wish I could see you again before you

(a) It is right to add that the dispute between Fowler and the plaintiff resulted in an award being made in favour of the latter.

leave town. I beg you will excuse my troubling you; and, with kind regard, believe me

"Yours very truly,
"SUSAN HURRY."

The defendant in reply addressed to Mrs. Hurry the letter complained of in the second action; and, upon the plaintiff's afterwards calling on Mrs. Hurry to ascertain the result of her communication, she, like Mr. Cleaver, thought fit to hand the defendant's letter to him.

At the trial it was conceded that the letters were libellous; but it was submitted, that, in the absence of malice, they were privileged communications.

Evidence having been given on the part of the defendant in support of his pleas of justification, the learned judge left it to the jury to say,—first, whether the charges contained in the letters were substantially true,—secondly, whether the defendant was actuated by feelings of malice towards the plaintiff, or whether the letters were written by him in the bonâ fide belief that the matters therein contained were true.

*400] *The jury answered the first question in the negative, and to the second that there was no malice: and they returned a verdict for 40s. on each libel.(a)

Coleridge, Q. C., on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant, on the ground that the letters were under the circumstances privileged, or for a new trial on the ground that the verdict was against evidence. As to the first letter, he submitted that the defendant had a right to state his reasons for declining to act as arbitrator, as invited; and, as to the second, he contended that it was clearly privileged as an answer to a letter written with the sanction of the plaintiff himself.

Montagu Chambers, Q. C., and *Joyce*, showed cause.—*Primâ facie*, the moment a man writes and publishes that which is disparaging of another, he is guilty of a libel: and, if the publication is to be excused on the ground that it is privileged by the occasion, the onus lies on the defendant to show that it falls within the rule as to privileged communications. Further, it is submitted, that, as matter of law, the imputation must not go beyond the occasion, or be unnecessary or irrelevant. It is the duty of the judge to look at all the circumstances connected with the writing of the libel or the uttering of the slander, and himself to decide whether it is a case of privileged communication, or whether it is not such a wrongful act as to make it actionable at law. It may also be that the writing is within the rule as to privileged *communications, and yet the privilege *401] may be rebutted by proof or by inference of malice. Whatever doubt might arise as to the first libel here, there could be none as to the second, as to which the question of malice or no malice could not arise. In *Bromage v. Prosser*, 4 B. & C. 247, 254 (E. C. L. R. vol. 10), 6 D. & R. 296, Bayley, J., lays down very plainly the principles which are to guide the judge in such a case. "If," says

(a) The verdict was that of a majority of the jury, taken by consent. A doubt was afterwards suggested as to whether the parties could be bound by it. But the court intimated a strong opinion that they were.

that learned judge, "in an ordinary case of slander (not a case of privileged communication), want of a malice is a question of fact for the consideration of a jury, the direction (a) was right; but, if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury: and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence to show they were not spoken *with malice*, is said to have been agreed (either by all the judges, or at least by the four who thought the truth might be given in evidence on the general issue) in *Smith v. Richardson*, Willes 20; and it is laid down 1 Com. Dig. *Action upon the Case for Defamation* (G. 5), that the declaration must show a *malicious intent* in the defendant: and there are some other very useful elementary books in which it is said that malice is the gist of the action; but in what sense the word *malice* or *malicious intent* are here to be understood, whether in the popular sense or in the sense the law puts upon those expressions, none of these authorities state. Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without *just cause or excuse. If I [*402 give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not; and, if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" A man has no right to say of another or to publish anything which is *primâ facie* defamatory, that does not fairly arise out of the occasion. In such a case it plainly is the duty of the judge to hold that it is out of the privilege. In *Tuson v. Evans*, 12 Ad. & E. 733 (E. C. L. R. vol. 40), 4 P. & D. 396,—which has erroneously been supposed to have been broken in upon by subsequent cases,—the defendant claimed rent of the plaintiff; the plaintiff's agent (with whom the plaintiff had authorized the defendant to correspond on the subject, refusing himself to communicate with the defendant immediately), told the defendant that the plaintiff denied his liability: the defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding,—“This attempt to defraud me of the produce of the land is as mean as it is dishonest:” it was held that the publication in these terms was not privileged, and that the judge was justified in directing the jury that it was a libel. “Some remark,” said Lord Denman, “from the *defendant on the refusal to pay the rent was perfectly [*403 justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his

(a) That, if the words were not spoken maliciously, the defendant was not answerable.

case upon any future claim; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another: and this is the principle on which privileged communication rests. But defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest in the present case to deny the truth of the plaintiff's assertion: to characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary." Who can say that it was necessary for the defendant here, in declining to act as arbitrator, to launch out into such statements as are contained in these letters? He clearly had no right to indulge in imputations not fairly arising out of the occasion. *Cooke v. Wildes*, 5 Ellis & B. 328, will probably be relied on for the defendant: but there the court, it is submitted, went far beyond the necessity of the case. But, in delivering the judgment, Lord Campbell says: "We fully adhere to the doctrine laid down in *Somerville v. Hawkins*, 10 C. B. 583 (E. C. L. R. vol. 70), and *Taylor v. Hawkins*, 16 Q. B. 308 (E. C. L. R. vol. 71), that it is matter of law for the judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels

*404] the inference of malice, constituting what is called a *privileged communication*: and, if at the close of the plaintiff's case there is no intrinsic or extrinsic evidence of malice, that it is the duty of the judge to direct a nonsuit or a verdict for the defendant, without leaving the question of malice to the jury, as a different course would be contrary to principle, and would deprive the honest transactions of business and of social intercourse of the protection which they ought to enjoy." In *Brown v. Croome*, 2 Stark. N. P. C. 297 (E. C. L. R. vol. 3), it was held that an advertisement in a public paper strongly reflecting upon the character of an individual who had been declared bankrupt, was libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious. "The question," said Lord Ellenborough, "is, whether the defendant was justified in publishing this advertisement to the world, when all the communication which was necessary might have been made in a manner less injurious." A similar opinion is expressed by Alderson, B., in *Woodward v. Lander*, 6 C. & P. 548 (E. C. L. R. vol. 25). *Warren v. Warren*, 1 C. M. & R. 250, is to the same effect. The plaintiff and defendant were jointly interested in property in Scotland, of which C. was manager: the defendant wrote to C. a letter principally about the property and the conduct of the plaintiff with reference thereto, but containing a charge against the plaintiff with reference to his conduct to his mother and aunt: and it was held, that, though the part of the letter about the

defendant's conduct as to the property might be confidential and privileged, such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt. "The *manager," said Parke, B., "could have nothing to do with that." Neither could Mr. Cleaver or Mrs. Hurry have any. [*405
 thing to do with the plaintiff's conduct in his dealings with Mr. Fowler. In *Godson v. Home*, 1 Brod. & B. 7 (E. C. L. R. vol. 5), Richardson, J., says: "If a man, giving advice, calls another a thief, surely it is not necessary to leave it to the jury whether such language is a confidential communication." *Wenman v. Ash*, 13 C. B. 836 (E. C. L. R. vol. 78), is a very important case. The defendant, who had lodged in the house of the plaintiff, conceiving that he had whilst there lost certain documents, and imagining that the plaintiff had abstracted them from a box in which he had kept them, wrote a letter to the plaintiff's wife, stating his loss, and his suspicions, in language seriously reflecting upon the character of the plaintiff, and intimating, that, unless the plaintiff should think proper to return them, he would expose him: and it was held that the occasion did not justify the writing of the letter, so as to make it a privileged communication, and that the plaintiff was entitled to recover, although the jury negatived malice. Maule, J., there says: "Whether the circumstances under which a communication is made constitute it a privileged communication or not, is a question which the court has assumed the jurisdiction of deciding: but it is more a question of fact in each particular case than a question of law. The circumstance of the jury having negatived malice here, does not make the communication privileged. But we have to consider whether the fact of the defendant's having lodged in the plaintiff's house, and possibly lost something while there, gave him a privilege to address such a communication as that complained of to the plaintiff's wife. I think it did not. No reasonable person could think the course the defendant took was one which he was justified in taking to enforce his own interest." In *Toogood v. Spyring*, 1 C. M. & R. 181, 4 [*406
Tyrwh. 582, Parke, B., lays down the law in a manner which has never been questioned. "In general," he says, "an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the interference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." In *Coxhead v. Richards*, 2 C. B. 569, 608 (E. C. L. R. vol. 52), Cresswell, J., says: "Every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious. The law, however, on a principle of policy and convenience, authorizes many communications, although they affect

the characters of individuals; and I take it to be a question of law whether the communication is authorized or not." Again, at p. 606, he says: "Where a party asks advice or information upon a subject on which he is interested, or where the relative position of two parties is such that the one has a right to expect confidential information and advice from the other, it may be a moral duty to answer such inquiries and give such information and advice; and the statements made may be rendered lawful by the occasion, although defamatory of some *407] third person, as in *Dunman v. Bigg*, 1 Campb. *269, and *Todd v. Hawkins*, 2 M. & Rob. 20, 8 C & P. 88. Two cases,—*Herver v. Dowson*, Bull. N. P. 8, and *Cleaver v. Sarraude*, reported in *M'Dougall v. Claridge*, 1 Campb. 268,—were quoted as authorities for giving a more extended meaning to the term 'moral duty,' and making it include all cases where one man had information which, if true, it would be important for another to know. But the notes of those cases are very short: in the former, the precise circumstances under which the statement was made (see *King v. Watts*, 8 C. & P. 614, that such a statement made *without inquiry* is not lawful), and, in the latter, the position of the defendant with reference to the Bishop of Durham, to whom it was made, are left unexplained. I cannot, therefore, consider them as satisfactory authorities for the position to establish which they were quoted: and, in the absence of any clear and precise authority in favour of it, I cannot persuade myself that it is correct, as, if established at all, it must be at the expense of another moral duty, viz., not to publish defamatory matter unless you *know* it to be true." *Gilpin v. Fowler*, 9 Exch. 615, is also very much in point. The plaintiff was master of a national school in the parish of C., of which the defendant was rector, and also one of the managers of the school. The defendant requested the plaintiff to teach a Sunday-school in connection with the national school, which he declined on account of the increased labour, and he was in consequence dismissed. The plaintiff being about to set up a school on his own account in the same parish, the defendant wrote, and distributed in C. and in the adjoining parish, a "pastoral letter," in which he denounced the plaintiff's conduct as unchristian-like, and warned his parishioners against affording any countenance to the projected school, either by subscriptions or by sending their children *408] to it. The judge at the trial having ruled that this letter was a privileged communication, and that, there being no evidence of express malice, the defendant was entitled to a verdict,—the Exchequer Chamber, on a bill of exceptions to the above ruling, held that the communication was *not* privileged, and that there was evidence for the jury of express malice. The facts of the present case are short and simple. Fowler had brought an action against Whiteley for board and lodging, and for the price of a horse. It was a matter of controversy between them whether there was anything due for board and lodging, and also whether the horse had been bought by Whiteley or only taken upon trial. Mr. Cleaver, who was acquainted with Whiteley, and who entertained a high opinion of him, was desirous of getting the dispute with Fowler settled by mutual friends, and accordingly wrote to Mr. Adams asking him to consent to become arbitrator jointly with him in the matter. Mr. Adams

declined. A second letter was then sent to him, urging him in strong terms to assent to Mr. Cleaver's proposal. In answer to this second letter, the letter is written which forms the subject of the first count,—a letter which upon the face of it is wholly unwarranted by the occasion, and filled with vituperative and irrelevant attacks upon the moral character of Mr. Whiteley, and which could have nothing whatever to do with the question of his being arbitrator or not. From such a letter written on such an occasion the law necessarily infers malice,—not a private and particular malice towards the individual, but an unauthorized act injurious to him. The libel in the second count clearly admits of no excuse: it was altogether volunteered: it was not written upon an occasion which afforded the smallest justification for it: *Pattison v. Jones*, 8 B. & C. 578 (E. C. L. R. vol. 15), 3 M. & R. 101.

Coleridge, Q. C., and H. James, in support of the *rule.—The letters in question were clearly privileged communications, [*409 being made to persons who were substantially agents of the plaintiff and put in motion by him, and made in the discharge of what the defendant might fairly conceive to be a social and moral duty. In the first letter, the defendant is stating his reasons for declining to accept the office of arbitrator, the acceptance of which had been urged upon him by all those considerations which were the most calculated to influence the mind of a clergyman, and above all one of the peculiar notions entertained by the defendant: and the second was in answer to a letter addressed to the defendant by Mrs. Hurry with the plaintiff's cognisance. The jury have found that both letters were written *bonâ fide*, and that there was an entire absence of malice in fact. In *Harrison v. Bush*, 5 Ellis & B. 344, 348 (E. C. L. R. vol. 85), Lord Campbell, in delivering the judgment of the Court of Queen's Bench, says: "During the argument, a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communication rests. 'A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable.'" And, after advert- ing to the particular facts of that case, he adds,—"*Duty*, in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation." It is impossible to define what is a moral and social duty of imperfect obligation. It must depend upon the circumstances *of each case. The best defini- tion to be found in the books is that given by Parke, B., in [*410 *Toogood v. Spyring*. And the Preliminary Discourse in Starkie on Slander, pp. 48, 84, contains some remarks which are well worthy of consideration. The rule laid down at p. 320 of that learned work (2d edit.), is, that, "where a communication is made in confidence, either by or to a person interested in the communication, supposing it to be true, or by way of admonition or advice, it seems to be a general rule that malice is essential to the maintenance of an action."

In *Peacock v. Sir George Reynal*, 2 Brownl. & G. 151, it is said that, if the letter "had been directed to a father for reformation of any acts made by his children, it should be no libel, for it is but for reformation and not for defamation: for, if a letter contain scandalous matter, and be directed to a third person, if it be reformatory, and for no respect to himself [the writer], it shall not be intended to be a libel, for with what mind it was made is to be respected; as, if a man write to a father, and his letter contain scandalous matter concerning his children, of which he gives notice to the father, and adviseth the father to have better regard to his children, this is only reformatory, without any respect of profit to him which wrote it." And this, though a Star Chamber case, is adopted in Viner's Abridgment, *Libel* (A), 2., and in Bacon's Abridgment, *Libel* (A). The cases of *Coxhead v. Richards*, 2 C. B. 569 (E. C. L. R. vol. 52), and *Blackham v. Pugh*, 2 C. B. 611, show the extreme difficulty there is in determining the line of demarcation in these matters. A case of this kind was tried before Mr. Justice Hill a short time prior to his retirement. The facts were these:—Two attorneys' clerks had been fellow pupils, and on terms of great intimacy, leading rather looseish lives. One of them suddenly became very religious; and, seeing his former companion

*411] at a certain church with a young lady to whom he was paying his addresses, he, after consulting with the clergyman of his parish, wrote to the lady's parents, communicating to them all he knew of his former friend's antecedents. An action having been brought, the learned judge said, that, if the jury thought that the defendant reasonably believed that it was his duty to make the communication, he should hold it to be privileged. The jury, however, found for the plaintiff, with 1s. damages: and no attempt was made to disturb the verdict. In *Gardner v. Slade*, 13 Q. B. 796 (E. C. L. R. vol. 66), Coleridge, J., says: "If the circumstances are such that all that was said and done was consistent with duty, the speaking of the words can afford no evidence of malice." The rule as to bona fides is not that the circumstances must be such as to show that it was the defendant's duty to make the communication: it is enough if he be in such a position that he may reasonably believe that it was his duty, though in this he may have been mistaken. Malice is not to be inferred from the mere circumstance of the defendant having acted upon an incorrect view of his duty: *Pater v. Baker*, 3 C. B. 831 (E. C. L. R. vol. 54). In *Somerville v. Hawkins*, 10 C. B. 583 (E. C. L. R. vol. 70), the plaintiff had been in the service of the defendant, and had been dismissed on a charge of theft. He afterwards came to the defendant's house, and had some conversation with the defendant's servants. The defendant, addressing himself to two of them, said (speaking of the plaintiff),—"I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him." In an action for those words, Maule, J., in delivering the considered judgment of the court, says: "We think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends

*412] all cases of communications made bona fide, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, sup-

posing the defendant himself to believe the charge,—a supposition always to be made when the question is whether a communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, as such association might reasonably be apprehended to be likely to be followed by injurious consequences both to the servants and to the defendant himself.” [KEATING, J.—When you introduce “honesty” as an element, do you not at once make the question of privilege one for the jury? BYLES, J.—The question is, what is the defendant’s duty; not what he *thinks* to be his duty.] The letters being *prima facie* privileged by the occasion, the plaintiff was bound to prove express malice in order to take away the privilege: *Child v. Affleck*, 9 B. & C. 403 (E. C. L. R. vol. 17), 4 M. & R. 338. The language of Lord Ellenborough in *Pitt v. Donovan*, 1 M. & Selw. 639, is particularly applicable here. That was an action for slander of title conveyed in a letter to a person about to purchase the estate of the plaintiff, imputing insanity to one Y., from whom the plaintiff purchased it, and that the title would therefore be disputed, per quod the person refused to complete the purchase. The defendant had married the sister of Y., who was heir-at-law to her brother in the event of his dying without issue. In leaving the case to the jury, Graham, B., said that “the gist of the action was malice,—not malice in the worst sense; but it was enough that the act done was wrongful, and done under circumstances that marked an intention to do an injury; and that would depend, not on the *circumstance whether he believed it to be true, but [*413 *whether his belief was such as a man of sound mind, or a man of sense and knowledge of business, would have formed.*” “That,” says Lord Ellenborough, “is what he was not justified in saying; for, with reference to the competency or incompetency of Y., certainly the question in this cause does not depend on that; for, if what the defendant has written be most untrue, but nevertheless he believed it, if he was acting under the most vicious of judgments, yet if he exercised that judgment *bonâ fide*, it will be a justification to him in this case. Whether his belief be such as a man of sound sense and knowledge of business would have formed, is not the question: the opinion which a rational man would have formed on such a subject might be that Mr. Y. was competent; but the jury must arrive at their conclusion in this case through the medium of malice or no malice in the defendant. In that way it might have been left to them, not if you think that no man of a rational understanding would come to such a conclusion, but you will say whether this defendant, with such an understanding as he possesses, did *bonâ fide* arrive at the conclusion which he has stated, or whether he did not use it as a mere pretence, colour, and cloak for his malice.” As to the first letter, here, considering the circumstances under which he was pressed to take upon himself the office of arbitrator in the disputes between Fowler and the plaintiff, the defendant clearly had a social and moral duty, as well as a sort of interest in explaining to Mr. Cleaver why he declined to accept it. The court will not very closely scrutinize the extent of the interest or the nature of the duty. And, as to the second letter, it can hardly be said that the defendant was a volunteer: it was

written in answer to one received from Mrs. Hurry after she had had
*414] a conversation with the plaintiff on the subject, and may
*almost be said to have been written on his invitation.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The action is brought to recover damages for two separate libels, the first count being on a letter addressed by the defendant to a clergyman named Cleaver, the second on a letter addressed by the defendant to a lady named Hurry. Each of these letters contains matter which is clearly defamatory of the plaintiff, and forms the foundation of an action unless the circumstances under which it was written bring it within the protection afforded by the law to what are called privileged communications. I take it to be clear that the foundation of an action for defamation is malice. But defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again lately in the Court of Queen's Bench, that, if the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the person writing or uttering them, he is bound to hold that the action fails. In the present case the jury found that the letters were written by the defendant *bonâ fide* and in the honest belief that what he wrote was true and that it was his duty to make the communications he did. Do the circumstances show that the letters were written in the discharge of some social or moral duty, or that the writer or the person to whom they were addressed had an interest in making or
*415] *receiving the communications? Taking the two letters separately, I feel bound to answer that question in the affirmative. They were confidential, in the sense that they need not and ought not to have passed beyond the persons to whom they were respectively addressed. The plaintiff, it appears, had been held in great estimation by the members of the congregation of St. Barnabas. The Rev. Mr. Cleaver was one of the assistant-curates of that church: and Mrs. Hurry and her two daughters were persons who took a deep interest in the spiritual welfare of the congregation. In the spring of 1860, Mrs. Hurry and one of her daughters went to make a short stay at Stockcross, of which parish the defendant was rector. The plaintiff visited them there, and became acquainted with the defendant, who introduced him to one of his parishioners, named Fowler; and the result of the acquaintance so commenced, was, that the plaintiff and certain members of his family made frequent visits to Fowler's house, boarding and lodging with Fowler's family. Ultimately, however, circumstances occurred to disturb the harmony between these parties, and disputes arose as to Fowler's right to pecuniary compensation for his hospitality, and also as to a transaction about an alleged sale of a horse, and other matters; and an action was brought by Fowler against the plaintiff. Mr. Cleaver being informed of what was going on, and being desirous of putting an end to the litigation in a friendly manner, wrote to the defendant, as Fowler's clergyman, to ask his aid

in the matter, by acting as arbitrator with himself. The defendant answered this letter by declining the invitation,—telling Mr. Cleaver, in substance, that, if he or any of the other clergymen of St. Barnabas would go down to Stockeross, he would give them such information as would satisfy them that he had good *grounds for his refusal. Then came the letter from Mr. Cleaver which provoked [416 the first alleged libel. Mr. Cleaver's second letter adjured the defendant as a matter of christian duty to recall his decision. It was the letter of one clergyman of strong religious opinions writing to a brother clergyman whose notions coincided with his own, exhorting him as he valued his sacred calling to lend his aid in averting a public scandal from a marked member of his congregation. In answer to the appeal so made, the defendant in effect says,—I cannot consent to do as you wish; and I will tell you why I cannot: and he goes on to give his reasons, in order to convince the person he was addressing that it was not his duty to interfere as requested. It seems to me, that, under all the circumstances, it was the social and moral duty of the defendant as a clergyman towards Mr. Cleaver as another clergyman to give him true and correct information on the subject upon which he was writing. I say emphatically that I think he was discharging a social and moral *duty*: and I also think it was his *interest*, if he wished to stand well with those whose religious opinions coincided with his own, to satisfy them that he was not shrinking from the performance of his duty as a clergyman, in declining to act the part of a peacemaker.

Then, as to the letter which constituted the alleged libel in the second count, the difficulty of the defendant seems to me to be infinitely greater than with regard to the first letter. It did not appear that there had been any request to Mrs. Hurry to interfere in the matter. The plaintiff probably knew that Mrs. Hurry had written to the defendant, for he went, it seems, to her house to receive his answer. But the defendant himself was the party who initiated the movement of that lady. He called upon her and made certain *statements to her respecting the plaintiff. It may be said that [417 this was done in the fair exercise of an interest, in this sense,— Mr. Cleaver had deluded him into the belief that he might write to him in confidence; and when he received his letter he handed it to the plaintiff. Smarting under this dishonourable treatment, the defendant calls on Mrs. Hurry (who had been the means of introducing the plaintiff into his parish), and tells her that an action has been brought against him, and talks very freely to her of the circumstances which had led to it. She endeavoured to persuade him that the opinion he had formed of the plaintiff was an erroneous one, and told him she would see that gentleman and communicate to him the result of the interview. Mrs. Hurry afterwards did see the plaintiff, and wrote to the defendant in a very kindly spirit, telling him that the plaintiff denied all the charges that had been made against him, and expressing a hope that all would be amicably and satisfactorily arranged. In what position would the defendant have placed himself if he had left that letter unanswered? He assures Mrs. Hurry that the imputations are well-founded: and he adds,—“If he” (meaning the plaintiff) “states on oath in the witness-box what he has

stated to you, especially as to the charge of assault, he will be most certainly prosecuted for perjury; for, there is not a shadow of doubt but that the complaint of the servant girl is correct." If that was what the defendant really believed to be true, I think Mrs. Hurry's letter, which showed she entertained a high opinion of the moral and religious character and conduct of the plaintiff, written under the circumstances under which it was written, fully warranted it. I think the defendant was only discharging a social and moral duty in writing to the lady, "Madam, your confidence is misplaced." I also think, *418] the plaintiff's first action being *then pending, that the defendant had a direct interest not to allow Mrs. Hurry's letter to pass as if he acquiesced in the opinion therein expressed. Not only, therefore, was the defendant in my judgment discharging a social and moral duty, but he was also acting with a just view to his own interest in writing that letter. Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification: but all are clear that it is a question for the judge to decide; and I am clear that the letters in question, seeing the circumstances under which they were written, do not show what in law amounts to malice. I fully concur in the doctrine referred to in Starkie on Slander, that it is important to get at the true character of persons you are obliged to be in communication with and to treat with confidence. The law as to privileged communications was formerly much more restricted than it is at the present day. The case of *Peacock v. Sir George Reynal*, 2 Brownl. & G. 151, is an early and a very strong example. The rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth. The privilege of criticizing and discussing the words and acts of public men has in modern times been very widely extended; and so also has the rule as to giving information concerning private individuals, when given *419] *bonâ fide*, and to a person having *an interest in making the inquiry, and, in my judgment, with very good reason.

WILLIAMS, J.—I am of the same opinion. After the finding of the jury that the defendant acted *bonâ fide*, this argument must proceed upon the assumption that the defendant believed that the imputations he was making were well founded. That being so, he finds Mr. Cleaver and Mrs. Hurry to be under what he had a right to suppose a delusion with regard to the plaintiff, and that they erroneously believed him to be a good and pious man. For the reasons given by my Lord, I think that Mr. Cleaver and Mrs. Hurry stood in such a relation to the defendant that it was his moral and social duty to undeceive them as to the true character of a person whom they set such a mistaken value upon. I do not mean to say that it would be the duty of the defendant to proclaim the plaintiff's delinquencies in public: but I think he was justified in making them known to per-

sons whom it was his duty to undeceive. Applying the rule adopted in *Harrison v. Bush*, 5 Ellis & B. 344 (E. C. L. R. vol. 85), I am clearly of opinion that the occasions privileged these communications, and prevented them from being actionable.

BYLES, J.—I am of the same opinion. I conceive the rule upon this subject to be clear ever since the case of *Toogood v. Spyring*. The law considers the publication of defamatory matter to be malicious, “unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.” The more that case is examined, the more carefully and accurately the rule will be found to be expressed. Its application to particular cases has always been attended with the greatest difficulty: *the combinations of circumstances are so infinitely various. As to the first por- [*420
tion of the first letter of the defendant in this case, I think it was excusable on the ground that it was written by him “in the conduct of his own affairs in a matter where his interest was concerned.” He was asked to consent to be arbitrator in a dispute between the plaintiff and one of his own parishioners to whom he himself had introduced the plaintiff. He declined the office. He was pressed by his brother clergyman in terms which left him no alternative but to give his reasons for persisting in his refusal. His interest was concerned. He had a right to give his reasons. He certainly goes on to say,—“Inasmuch as he (the plaintiff) said a great deal to my parishioners about his intimacy with the clergy of St. Barnabas, I think it my duty to unmask him to you; and I should be very thankful to be enabled to tell some of my neighbours that his position at St. Barnabas is not quite what he led them to suppose it to be, and especially that his official connection with the English Church Union had ceased.” He however says he thinks it his *duty* to make this communication: and the jury have found that he did *bonâ fide* think so. The letter, it must be remembered, was written by one clergyman to another, both zealous and conscientious men,—the one urging the other by his duty as a christian minister to aid in the removal of a great scandal from the congregation of which the plaintiff was a member; and the other replying in terms which showed that he evidently thought it his duty to make the communication he did. It seems to me that both parts of that letter were privileged. As to the second letter, I am disposed to think it was privileged on the ground of interest. At the time it was written an action had been brought against Mr. Adams,—a groundless action, as he conceived,—for having written the first *letter. He knew that Mrs. Hurry was in communi- [*421
cation with the plaintiff, and had reason to believe that the letter would be shown to him; and there is good ground for saying that it was sent in order that it might reach the hands of the plaintiff. I therefore think, though with some doubt, that the second letter was privileged on the second ground put by Parke, B., in *Toogood v. Spyring*.

KEATING, J.—I am of the same opinion. There is no difference as to the rule of what constitutes a privileged communication. It is clearly and accurately laid down in *Toogood v. Spyring*, 1 C. M. & R. 181, 4 Tyrwh. 582, and also in *Harrison v. Bush*, 5 Ellis & B. 344

(E. C. L. R. vol. 85). The only difficulty is as to its application to the facts and circumstances of this case. That is a difficulty which must often arise from the infinitely various combinations of circumstances. After the very full judgments given by the other members of the court, I only think it necessary to say that I concur.

Rule absolute.(a)

(a) See the next case.

*422]

*FRYER v. KINNERSLEY.(a) Nov. 24.

On the recommendation of one E. (who was superintendent of the Horticultural Society's gardens, and in the habit of recommending gardeners to its members), K. hired F. in that capacity. Being dissatisfied with him after some months, he gave him notice to leave his service, and called upon E. to recommend him another gardener in his place. Shortly afterwards K. wrote to E. a letter, complaining of F.'s conduct; in which letter, amongst other things, he said,—“On Saturday I had another scene with F. in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and eyes starting from the sockets with rage, a perfect raving madman. I was, fortunately, accompanied by my upper servant. He accused me of having opened a letter of his, &c. I think it right that you should be informed of F.'s violent conduct, as you might unwittingly recommend him, without being aware of his temper and faults.” In consequence of this letter, E. refused to employ F. in the society's gardens, as he before had done, and but for the letter would have done again:—

Held, that, assuming that the relation between K. and E. was such as to warrant a communication on the subject of F.'s conduct, the above letter was excluded from the privilege, by reason of excess.

THIS was an action for a libel. Plea, the general issue.

The cause was tried before Keating, J., at the sittings in Westminster after last Trinity Term. The facts which appeared in evidence were as follows:—The plaintiff had been employed as a gardener under Mr. Eyles, the superintendent of the Royal Horticultural Gardens, of which society the defendant was a member. The defendant having applied to Mr. Eyles to recommend him a gardener, that gentleman, who was in the habit of recommending gardeners to members, though it was no part of his duty as superintendent to do so, sent the plaintiff to him, and the defendant engaged him in January, 1862. In January, 1863, being dissatisfied with the plaintiff's conduct, the defendant gave him notice to quit his service on the 30th of April following, and applied to Mr. Eyles to recommend him another in his place, and had some conversation with him on the subject, in the course of which he told him the grounds of his dissatisfaction; and he on the 20th of April wrote and sent the following letter (which was the libel complained of) to Mr. Eyles:—

“Binfield Manor, Berks. 20th April, 1863.

*423] “Dear Sir,—On Saturday I had another scene with *Fryer in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and eyes starting from the sockets with rage, a perfect raving madman. I was, fortunately, accompanied by my upper servant. He accused me of having opened a letter of his, and said he had written to the General Post Office about it, and would take proceedings, as it was an indictable offence. I have found in my post-bag, since my notice to him to

(a) See the preceding case.

leave, a letter and a daily newspaper. The letter was delivered to him unopened; and certainly no letter for him was ever opened by me. I went to-day to inquire at the Bracknell post-office if he had made any complaint there about me, but found that no complaint had been made there. Mr. Bartlett told me that some time ago Fryer obtained a post-office order for some one in London, and, not having given the correct name and address, the money was not paid, and he came to the post-office and abused Mr. Bartlett in very rude language. I think it right that you should be informed of Fryer's violent conduct, as you might unwittingly recommend him, without being aware of his temper and faults. I have engaged the gardener of whom I spoke to you. He has been here, and likes the place.

"I am, dear Sir, yours truly,
"EDWARD KINNERSLEY."

On the 22d of April, Mr. Eyles wrote in answer, as follows:—

'Dear Sir,—I am surprised and very much annoyed to hear that Fryer has behaved so shamefully to you. I had intended to have him taken on here again on leaving you; but I cannot think of doing so after such behaviour. I certainly shall have nothing more to do with him; and I am only extremely sorry that I should have been the means of his coming to you: but I evidently did not know his temper and disposition. [*424

"J. EYLES."

The plaintiff having, after he left the defendant's service, applied to Mr. Eyles to give him employment in the society's gardens, that gentleman declined to do so, and read to him the defendant's letter; whereupon this action was brought.

The declaration consisted of two counts for libel each setting out a different part of the letter, but not accurately (Mr. Eyles having refused to furnish him with a copy), and a count for verbal slander, which last was abandoned at the trial.

Mr. Eyles, who was called as a witness on behalf of the plaintiff, stated that he would but for the defendant's letter have given the plaintiff employment. He also stated, that it was no part of his duty as superintendent to recommend gardeners to members of the society, but that he frequently did so, and that he always when he had an opportunity inquired how they were getting on. It did not, however, appear that the defendant's letter was written in answer to any such inquiry.

On the part of the defendant it was submitted that there was a variance between the letter and the libels as alleged in the declaration, and further that the letter fell within the class of privileged communications.

The learned judge declined to nonsuit the plaintiff, but reserved leave to the defendant to move to enter a verdict or a nonsuit,—the court to be at liberty to amend if they should be of opinion that the judge ought to have amended: and he left it to the jury to say whether the letter was bonâ fide written or whether the defendant was actuated by malicious motives towards the plaintiff, and also to assess the damages.

*The jury negatived malice, and assessed the damages at 10l. A verdict having been entered for the plaintiff accordingly, [*425

Shee, Serjt., on a former day in this term, pursuant to the leave reserved to him, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the ground of variance, and that the letter was a privileged communication.

Digby Seymour, Q. C., and *Laxton*, on a subsequent day, showed cause.—It was clearly competent to the judge to amend the declaration: *Saunders v. Bate*, 1 Hurlst. & N. 402: and it is hardly possible to conceive a fitter case for the exercise of his discretion. [ERLE, C. J.—Address your argument to the question of privilege.] The only circumstance which can at all be relied on as a justification for the publication of this libel, is, that the plaintiff had originally been recommended to the defendant by Eyles. That, however, did not give Eyles such interest in the matter as to warrant the defendant in volunteering statements calculated unduly to prejudice the plaintiff in his estimation and to prevent him from again taking him into his employ; nor did it impose upon the defendant any social or moral duty which could in any way justify his officiousness. The letter was evidently written in a moment of irritation and excitement. It was wholly uncalled for by any relation in which the writer stood to the person to whom it was addressed. In *Rogers v. Clifton*, 3 Bos. & P. 587, it was held, that, although a master be not in general bound to prove the truth of a character given by him to a person *applying for* the character of his servant, yet, if he officiously state any trivial misconduct *426] of the servant to a former master, in order to prevent him *giving a second character, and then himself, upon application for a character, give the servant the character of “a bad-tempered, lazy, incompetent fellow,” the truth of which he is unable to prove, the jury may from these circumstances infer malice on the part of the master, in an action against him by the servant. In *Pattison v. Jones*, 8 B. & C. 578 (E. C. L. R. vol. 15), 3 M. & R. 101, it was held that such a communication, to be privileged, must be made *bonâ fide* in the belief by the party that he is acting in the discharge of a duty which he owes to the party to whom it is made. And that is adopted by Tindal, C. J., in *Coxhead v. Richards*, 2 C. B. 597 (E. C. L. R. vol. 52). In *Brooks v. Blanshard*, 1 C. & M. 779, A. was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the commissioners for the improvement of the river Wear, and A. became a candidate. B. wrote to C. introducing D. as a candidate, and, C. having written to B. informing him that another person had succeeded in obtaining the appointment, B. wrote an answer to C. reflecting on the conduct of A. whilst in the situation of engineer to the railway company. There was a subsequent election, at which A. was unsuccessful, in consequence of this letter having been shown. It appeared that B. and C. were both shareholders in the railway company, and that B. managed C.'s affairs in the railway. B. had not been applied to for his opinion, and the letter containing the libel was written after the termination of one election, and before the other was in contemplation. In an action by A. against B. for the libel, it was held that the letter was not a privileged communication. Again, in *Martin v. Strong*, 5 Ad. & E. 535

(E. C. L. R. vol. 31), it was held that words spoken by a subscriber to *a charity, in answer to inquiries by another subscriber respecting the conduct of a medical man in his attendance [*427 upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. This clearly is not a privileged communication within the rule laid down in *Toogood v. Spyryng*, 1 C. M. & R. 181, 4 Tyrwh. 582, and *Harrison v. Bush*, 5 Ellis & B. 344 (E. C. L. R. vol. 85).

Shee, Serjt., and *Kingdon*, in support of the rule.—It is submitted that the letter in question was a privileged communication within the rule laid down in *Toogood v. Spyryng* and *Harrison v. Bush*. That rule cannot be better stated than in the language of Parke, B., in the former of those two cases. "In general," says that learned judge, "an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society: and the law has not restricted the right to make them within any narrow limits. Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred: but one of the most ordinary and common instances in which the principle has been applied in practice, is, *that of a former master giving the character of a discharged [*428 servant; and I am not aware that it was ever deemed essential to the protection of such a communication, that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. *If made with honesty of purpose to a party who has any interest in the inquiry* (and that has been very liberally construed, —see *Child v. Affleck*, 4 M. & R. 338, 9 B. & C. 403 (E. C. L. R. vol. 17)), the simple fact that there has been some casual by-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications." That is in substance adopted by Lord Campbell, in giving judgment in *Harrison v. Bush*, 5 Ellis & B. 344, 348 (E. C. L. R. vol. 85), and it has never been questioned. Can it be said that the defendant had not an interest here, or that Mr. Eyles, through whose recommendation the plaintiff had entered the defendant's service, had not likewise an interest in knowing what had been the conduct of the man he had so recommended? It has been suggested that this communication was officious and voluntary. But, though the judges of this court were divided in opinion in the case of *Coxhead v. Richards*, 2 C. B. 569 (E. C. L. R. vol. 52), they at all events did not differ in this, that the circumstance of the communication being voluntary did not prevent it from being protected.(a) The real ques-

(a) See *Bennett v. Deacon*, 2 C. B. 628 (E. C. L. R. vol. 52).

tion is whether the communication was made in the discharge of some public or private duty, social or moral, or in a matter in which the party making it has an interest. Here, the jury found that the communication was honestly and *bonâ fide* made. The defendant had applied to Eyles to recommend him a gardener; and Eyles (who was in the constant habit of doing so to members of the society of which *429] he was *the superintendent) had recommended the plaintiff: it was clearly, therefore, the defendant's duty to inform Eyles of his servant's misconduct, and Eyles had clearly an interest in knowing the sort of person he had recommended. [BYLES, J.—Without any inquiry on Eyles's part?] Yes. [ERLE, C. J.—If this letter had been addressed to Mr. Eyles in answer to an inquiry from him, that might have afforded a justification. But this was the act of a mere volunteer. I must confess I entertain very grave doubts. WILLIAMS, J.—In *Harrison v. Bush*, Lord Campbell says,—“‘Duty,’ in the proposed canon, cannot be confined to *legal* duties, which may be enforced by indictment, action, or mandamus, but must include *moral* and *social* duties of imperfect obligation.” The question is whether this was done in the performance of a social duty.] The beginning of the letter shows that there had been previous communications between the defendant and Eyles upon the subject in hand. [BYLES, J.—The letter charges the plaintiff with something like an indictable offence.] There was no intention to accuse the plaintiff of a deliberate design to use the knife. It is not as if the letter had been addressed to a perfect stranger. It is not unworthy of remark that it would have been Eyles's duty to make inquiry of the defendant before he recommended the plaintiff to any other gentleman. Coltman, J., in *Coxhead v. Richards*, says,—2 C. B. 601 (E. C. L. R. vol. 52),—“Even though the statement be not on advice asked, but is made voluntarily, that circumstance was said in *Pattison v. Jones*, 8 B. & C. 578 (E. C. L. R. vol. 15), 3 M. & R. 101, not necessarily to prevent the statement from being considered as privileged.” [KEATING, J.—Bayley, J., in *Pattison v. Jones*, says,—“I do not mean to say, that, in order to make libellous matter written by a master privileged, it is essential *430] that the party who makes the communication should be *put into action in consequence of a third party's putting questions to him. I am of opinion he may (when he thinks that another is about to take into his service one who he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from and put questions to him.” That comes very near to the present case.] *Wright v. Woodgate*, 2 C. M. & R. 573, Tyrwh. & G. 12, is also a very strong case. The defendant was a solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made him a present of his indentures, because he was worse than useless in the office: and it was held that this was a privileged communication.

ERLE, C. J.—Upon the question whether or not this was a privi-

leged communication, there is some little difference of opinion, and therefore we will take time to consider. We think, however, that the amendment should be made, the defendant being at liberty to plead to the amended declaration,—the costs of the day and of the amendment to be costs in the cause for the defendant.

Shee, Serjt., intimated that the defendant had no desire to go down again: if the court should be against him upon the question as to the letter being a privileged communication. *Cur. adv. vult.*

*ERLE, C. J., now said: This was a rule to set aside the verdict for the plaintiff, and to enter a verdict for the defendant [*481 or a nonsuit, in an action for a libel, on the ground that the defamatory letter complained of was a privileged communication. Whatever might have been our opinion as to the privilege on the ground that Mr. Eyles, the person to whom it was addressed, had recommended the plaintiff to the defendant, and was in the habit of finding gardeners for masters and masters for gardeners, if the letter had been strictly confined to a simple statement of the plaintiff's conduct as a servant, we think the defendant cannot on this occasion take any advantage from that, because the letter in our judgment goes far beyond the occasion. The calling the plaintiff "a raving madman," and some other expressions, are so much in excess of the occasion as to prevent our holding the letter to fall within the rule as to privileged communications. Without, therefore, further expressing any opinion, we think the rule must be discharged. The verdict for the plaintiff will consequently stand. Rule discharged.(a)

(a) This and the preceding case form a striking example of the extreme difficulty there is in the application of the rule laid down by Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181, 4 Tyrwh. 582, and adopted and perhaps a little extended by Lord Campbell in *Harrison v. Bush*, 5 Ellis & B. 344 (E. C. L. R. vol. 85).

*BLACKMAN and Another v. BAINTON. Nov. 18. [*482

Twenty-five witnesses and a horse on one side against ten witnesses on the other,—Held not such a preponderance of "inconvenience" as to induce the court to bring back the venue from the place where the cause of action (if any) arose.

THIS was action to recover damages for an alleged breach of a warranty of a horse.

The venue being laid in Middlesex, the defendant obtained an order of Willes, J., to change it to York, upon an affidavit which stated that the cause of action, if any, arose in the county of York, and not in the county of Middlesex or elsewhere out of the county of York; that it would be necessary and expedient for the defendant to subpoena no less than ten witnesses to support and establish his defence to the action, all of whom were material and necessary witnesses, and all resided at or near Beverley, in the county of York; that he had no witnesses residing out of the said county of York; and that the expense of trying the action in Middlesex would, the deponent believed, greatly exceed the expense of trying it in the county where the cause of action arose and the witnesses resided.

Brandt now moved to rescind the above order, upon an affidavit of one of the plaintiffs which stated that the action was brought to re-

cover the purchase-money paid by the plaintiffs to the defendant for a brown mare warranted (verbally and in writing) sound, free from vice, and quiet; that she was the most vicious and unquiet brute the deponent (who was a dealer) had ever possessed; that several grooms who had in vain attempted to ride her, as well as the deponent's three brothers and himself, were material witnesses to prove the plaintiffs' case, as well as several veterinary surgeons, amongst others, one of the professors at the Royal Veterinary College, to the number in all *433] of *twenty-five, all resided in Middlesex; and that the deponent estimated the extra expense of trying the cause in Yorkshire would be at least 100*l.*, besides the expense and risk of taking the mare down to York.

ERLE, C. J.—The cause of action having arisen in Yorkshire, and the inconvenience being about equal, the common-law right turns the scale.(a)

The rest of the court concurring,

Rule refused.

(a) It has generally been understood to be the plaintiff's common-law right, in a transitory action, to lay the venue where he pleases, and that the onus of showing a preponderance of "inconvenience" lay on the defendant. See Archbold's Practice, 11th edit. (Prentice), 1339, 1342.

BEVAN v. WHITMORE. Nov. 16.

An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade-assignee for the recovery of part of the bankrupt's estate, and the action proving unsuccessful, the trade-assignee paid the costs:—Held, that he was entitled to sue the official assignee for contribution.

The court or a judge has a discretion to dispense with bail on appeal, as well as with bail in error.

An official assignee of a district court of bankruptcy having been sued by the trade-assignee for contribution to the costs of an unsuccessful action to which the former was an assenting party, and judgment having gone against him,—Held, that it was a fit case for dispensing with bail on appeal.

THIS was an action brought by the plaintiff, who was the trade-assignee under a fiat against one Foster, a merchant at Birmingham, to recover from the defendant the sum of 127*l.*, being a moiety of the costs incurred and paid by the plaintiff in an action brought by both as assignees against one Dowling, under the following circumstances:—

In January, 1856, the bankrupt had given Dowling a bill of sale of certain property. He afterwards attempted a compromise with his *434] creditors under the *arrangement clauses of the Bankrupt Act: but, failing in this, he was made bankrupt, and the defendant, Whitmore, was appointed official assignee under the fiat, and the plaintiff, Bevan, who was the principal creditor of the bankrupt, trade-assignee. Dowling having possessed himself of the property conveyed to him by the bill of sale, the trade-assignee demanded their restoration on the ground that the conveyance was a fraudulent preference and an act of bankruptcy. Dowling declining to comply with this demand, the trade-assignee took the opinion of counsel; and, being advised that there was good ground of action against Dowling, he wrote to the official assignee requesting his concurrence in bringing

the action. Having obtained the concurrence of the official assignee, and having on the 29th of June, 1857, obtained an order from the commissioner for that purpose, the trade-assignee on the 4th of July brought an action of trover against Dowling. Mr. Crosbie acted as the attorney for the plaintiffs in that action,—Reece, the solicitor to the fiat, being Dowling's attorney, and having as such prepared the bill of sale for him. The declaration was delivered on the 4th of October, 1857, but the cause was not brought to trial until June, 1860, when it resulted in a verdict for the defendant. Whitmore was never in any way consulted during the progress of the proceedings. In the meantime, a case of *Monk v. Sharp*, 2 Hurlst. & N. 540, had been decided in the Court of Exchequer, which clearly showed that there was no foundation whatever for the action. (a)

*The claim in this action, which was tried before Erle, C. J., at the sittings in London after last Trinity Term, was [*435 for a moiety of the costs which Bevan had paid to Dowling's attorney, and also a moiety of the costs paid to the attorney who conducted the proceedings, Crosbie, and which last-mentioned costs were paid by Bevan after an action had been commenced against Whitmore and himself for them.

On the part of the defendant, it was submitted, that, whatever might have been his liability to Dowling for his costs, the mere circumstance of his permitting his name to be joined as a plaintiff in the action, for conformity, he having no personal interest in the matter, did not render him liable to Bevan; and, further, that, assuming that he could be liable, there was such culpable negligence on the part of Crosbie in proceeding in the action after the decision of *Monk v. Sharp*, as to disentitle Crosbie to recover his costs, or Bevan [*436 to recover contribution.

His Lordship directed a verdict to be entered for the plaintiff for the sum claimed, reserving leave to the defendant to enter a verdict for him or to reduce the damages, if the court should be of opinion that the plaintiff was entitled to recover nothing, or only a proportion of the costs paid to Dowling.

Hawkins, Q. C., on a former day in this Term, moved accordingly.—No doubt, as between Dowling and Whitmore, the goods of the latter would have been liable to an execution for Dowling's costs. But Bevan cannot sue for contribution. Whitmore was only joined for

(a) On the 26th of June, the plaintiffs, who were traders, petitioned the Court of Bankruptcy for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Viet. c. 106). They filed an account of debts, and made a proposal according to s. 214. At an adjourned meeting on the 6th of August, the plaintiffs did not attend, and neither the proposal nor any modification of it was accepted, whereupon the meeting was adjourned to the public court, and the plaintiffs were adjudged bankrupts under s. 223. The adjudication was not founded on the petition of a creditor, nor was the plaintiffs' petition dismissed. On the said 26th of June, the defendant was indebted to the plaintiffs. On the 6th of July, the plaintiffs assigned this debt to Messrs. D., and gave notice thereof to the defendant. Messrs. D. had at the time of the assignment of the debt to them notice of the petition for arrangement. It was held,—first, that the filing the petition for arrangement was not an act of bankruptcy, that petition never having been actually dismissed, and no petition for an adjudication of bankruptcy having been filed within two months, in pursuance of s. 76,—secondly, that, where a trader is adjudicated bankrupt under the 223d section without the filing of a petition by a creditor, the bankruptcy has no relation back to any act done by the bankrupt prior to the adjudication,—thirdly, that, for the reasons above mentioned, the plaintiffs were entitled to recover the debt in question as trustees for Messrs. D., notwithstanding the bankruptcy.

conformity: and he might have refused to permit his name to be used until a proper indemnity against costs was given to him. He is a mere officer of the court, having no personal interest in the result: whereas, Bevan, being a large creditor, had a direct interest. There is no case in which the point, though one of great importance, has been decided. [BYLES, J.—It is somewhat like the case of two trustees, and one having a beneficial interest and getting the other to join in an action for his benefit.] The nearest case to the present is *Turner v. Davies*, 2 Esp. N. P. C. 478, where Lord Kenyon says: "I have no doubt, that, where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-surety for contribution: but, where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security." [WILLIAMS, J.—The action there was *437] founded upon an equity, which would not exist if the one surety became so at the instance of the other.] Then, there was manifest negligence, as well on the part of Bevan, as on that of the attorney employed by him, in recklessly proceeding in the action against Dowling after a solemn decision of the Court of Exchequer which conclusively showed that there could be no hope of success. [BYLES, J.—If your first point fails, this one resolves itself into an objection of negligence on the part of the attorney employed by both.] It is submitted that Bevan, himself an attorney, was equally guilty of negligence, and may be said to have deluded Whitmore into consenting to a proceeding which he was bound to know must end in defeat.

ERLE, C. J.—Take a rule on the first point,—that the facts did not establish any liability in the defendant.

Quain showed cause.—At the time when these transactions took place, all assets of the bankrupt were received by the official assignee, and he alone had any control over the finances of the estate: and the evidence at the trial showed that there were funds which might have been retained to satisfy this liability. The official assignee had at least an equal interest with the trade-assignee in getting in the assets, being at that time paid by fees according to the scale provided by the Orders in Bankruptcy of 1852, s. 130: and there can be no reason why the two should not be jointly liable for the costs of an unsuccessful action brought by them jointly. It was Whitmore's duty to allow his name to be used in an action brought under the order of the commissioner: and there is no pretence for his asking an indemnity.

*438] *Lush*, Q. C., and *Hawkins*, Q. C., in support of the rule.—This case, it is submitted, does not fall within the ordinary rule as to contributories. An action of this sort only lies where formerly a court of equity would have compelled payment. It is not a mere action of contract: see the judgment of Eyre, C. B., in *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270, cited in *Cowell v. Edwards*, 2 Bos. & P. 268, and that of Lord Redesdale, in *Stirling v. Forrester*, 3 Bligh 576, 580, 596. [WILLIAMS, J.—It is altogether new to me to hear that those observations are applicable to any other than the case

of co-sureties. The principle is thus stated by Lord Eldon in *Craythorne v. Swinburne*, 14 Ves. 160, 164: "It has been long settled, that, if there are co-sureties by the same instrument, and the principal calls upon either of them to pay the principal debt, or any part of it, the surety has a right in this court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution; and I think that right is properly enough stated as depending rather upon a principle of equity than upon contract,—unless in this sense, that, the principle of equity being in its operation established, a contract may be inferred upon [from] the implied knowledge of that principle by all persons; and it must be upon such a ground of implied assumpsit, that, in modern times, courts of law have assumed a jurisdiction upon this subject; a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous; especially since it has been held that separate actions may be brought against the different sureties for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads. But, whether this depends upon a principle of equity, or is founded in contract, it is clear a person may by contract take himself out of the reach of the principle or *the im- [*439] plied contract. In the case of *Deering v. The Earl of Winchelsea*, which, I recollect, was argued with great perseverance, persons not united in the same instrument were made to contribute; and it was decided that there is no distinction whether they are bound in the same obligation or by several instruments. That case also established, that, though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction. If the relation of surety for the debtor is formed, and the fact is not that the party becomes surety for both the principal debtor and another surety, not for the principal alone, it is decided, that, whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases, upon the maxim that equality is equity: the creditor who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and, upon the principle requiring him to do justice, if he will not, the court will do it for him."] The plaintiff here, as a large creditor of the bankrupt, had a strong interest in attempting to get back the goods from the hands of Dowling. The defendant, as official assignee, had no interest but to do his duty as a public officer. The trade-assignee could not get in the assets without the aid of the official assignee: the latter was clearly entitled to be indemnified for the use of his name: *Ex parte Turquand*, *In re Dickenson*, 3 Mont. D. & De Gex 475. [KEATING, J.—Would the official assignee have been entitled to an indemnity where he had a large sum of money in his hands at the time? BYLES, J.—And where he assented to the action being brought? ERLE, C. J.—And where the action was brought with the leave of the commissioner?] The assets in hand were not applicable to *these [*440] costs; there was not enough to satisfy the claim of the solicitor to the estate. The assent to the action being brought was a mere official act in execution of the defendant's public duty: and the order of the commissioner would make it compulsory on the official assignee

to allow the action to be brought in his name. By so consenting, he could not lose any equitable right he had. If Whitmore had had execution levied on his goods for the whole cost due to Dowling, he clearly would have had a remedy in equity against the trade-assignee. It does not follow that contribution lies in the circumstances which have happened, because the trade and the official assignees are both parties on the record. *Turner v. Davies* has never been dissented from. [WILLIAMS, J.—Assuming it to be good law, all that *Turner v. Davies* establishes, is, that, if the plaintiff had induced the defendant to become surety with him for a third person, he could not sue him for contribution. How does that apply here?] The official assignee, having no personal interest in the result of the action, consented to become a nominal party at the request of the plaintiff. [BYLES, J.—Both have an interest in the result.] The official assignee did not retain the attorney: for, the bare act of concurring in an action being brought does not amount to a retainer. [BYLES, J.—Bevan's letter names the attorney, and Whitmore does not dissent.] He does not appear to have been consulted, or ever to have interfered in the matter.

ERLE, C. J.—We are all agreed upon the question of law, viz. that an action will lie for contribution where there is a joint liability, and one has paid the whole amount. The only doubt we have entertained, is, the duty of a jury being cast upon the court, what is the fair inference to be drawn from the facts. If the fair *result of the facts *441] be that the parties mutually agreed to sue, and the action failed, and one paid the whole costs, he would be entitled to call upon the other for a moiety. The best conclusion I am able to come to upon the facts, is, that Bevan and Whitmore concurred in bringing the action. If the action had been successful, Dowling would have paid the costs. They did not contemplate the possibility of failure. They, however, did fail. The event was unforeseen. It is clear that no one contemplated that Bevan alone should be liable. Upon the general principle, I think he is entitled to call upon his co-plaintiff for contribution.

WILLIAMS, J.—I am of the same opinion. Our decision appears to me to turn upon a question of fact. If the transaction is to be taken to be, that Whitmore authorized Bevan to employ Crosbie to bring the action in their names, and consented that the action should be brought as their joint action, he is clearly liable to pay half the costs, and also half the satisfaction due for the judgment, as between himself and his co-plaintiff: and it can make no difference, that, when he allowed his name to be used, he had no apprehension of having to pay costs. If, on the other hand, the real truth is that the action was commenced and set on foot by Bevan, he knowing that it could not be brought without the assent of the official assignee, and he induced the latter to allow his name to be used for form's sake only, for his own purposes, then it is pretty clear that he could have no action for contribution either in respect of the costs of the action or the judgment. Dealing with the facts as a jury, I can come to no other conclusion than that the defendant is liable.

*442] BYLES, J.—I agree with my Lord and my Brother *Williams that the fair result of the facts is, that the parties were

joint plaintiffs in the action against Dowling, and that they failed. I apprehend the rule of law to be clear, that, under such circumstances, he who pays the whole is entitled to sue for contribution: and that rule extends to all cases where one of two joint-debtors or joint-contractors pays the whole debt: *Sadler v. Nixon* (or *Hickson*), 5 B. & Ad. 936 (E. C. L. R. vol. 27), 2 N. & M. 258; *Prior v. Hembrow*, 8 M. & W. 873. The only difficulty here is, to determine whether the plaintiff and defendant were joint-debtors, equally liable for these costs. It is said that they are not, because they have not an equal interest,—the one being entitled as a creditor to a dividend out of the assets, and the other only to his per-centage. As between themselves, however, and Dowling, they were jointly and equally liable. It is clear that they were jointly liable to Dowling; and Whitmore being an assenting party to the bringing of the action, and the employment of Crosbie as the attorney, it is equally clear that they are jointly liable as between themselves. I therefore think the verdict for the plaintiff was right.

KEATING, J.—I am of the same opinion. The only just conclusion from the facts is this, that Whitmore authorized the bringing of the action against Dowling so as to become jointly liable with Bevan, not only for the costs due to Dowling, but also for the costs of their own attorney; and Bevan having paid the whole, he clearly was entitled to call upon Whitmore to contribute his share.

Rule discharged.

The defendant having appealed against the above decision, Willes, J., on the 23d of November, made an order "that bail on the appeal herein shall be dispensed with." The order was made [*448 upon an affidavit of the defendant himself, to the following effect:—

"1. I am one of the official assignees of the court of bankruptcy for the Birmingham district, at Birmingham, and have been such for twenty years and upwards last past. As such official assignee, I have given a bond to government, with sureties to the amount of 6000*l.*, for the due fulfilment of my duties:

"2. I reside at, &c., and am possessed of household furniture and effects which I estimate to be of the value of 800*l.* I am also possessed of office furniture of considerable value: and, as such official assignee aforesaid, I am entitled to receive an annual salary of 1000*l.* free of office expenses:

"3. This action is brought by the plaintiff, the trade-assignee of the estate of William Foster, a bankrupt, against me as official assignee of such estate; and, on the trial of the action, the learned judge intimated that the question in dispute would turn on a mere point of law, and he directed a verdict for the plaintiff, with liberty for me to move to enter the verdict for the defendant, or a nonsuit:

"4. My appeal to the court of error against the decision of this court is *bonâ fide*, and not with the intention of delaying the plaintiff in any way whatever. I am strongly advised by my counsel, and verily believe, that I have cause to be aggrieved by the decision of this court; and that, as there is no decided case analogous or bearing on the point in dispute in this action, it is important for the interests of myself and the other official assignees that this cause should be

solemnly argued and reheard before a court, of error, in order to obtain a decision upon the point of law reserved by the Lord Chief Justice on the trial:

*444] "5. I have resided in Birmingham and the *neighbourhood ever since my appointment to the office of official assignee at Birmingham as aforesaid; and my friends and acquaintances consist in a great measure of persons holding offices in the court of bankruptcy there, and solicitors practising before the court, and others with whom I come into communication in my official capacity, and I could not consistently, seeing the position I hold in Birmingham, ask any one to become bail for me to prosecute the proceedings in error:

"6. For the reasons aforesaid, I say that it is not essential for the interests of the plaintiff that security should be required from me to prosecute the proceedings in error in this action, and for the furtherance of justice the security of bail so to prosecute should not be insisted on."

Quain (Nov. 25th) moved for a rule to show cause why the order of Willes, J., should not be rescinded.—The learned judge, it is submitted, had no power to make this order: and the case is not a fit one for its exercise if the power exists. The 38th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), enacts that "notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs, or to pay costs where the appellant was plaintiff below, be given, *in like manner and to the same amount* as bail in error within eight days after the decision complained of, or before execution delivered to the sheriff." Bail in error is regulated by the 151st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which enacts, that, "upon any judgment hereafter to be given in any of the superior courts of common law in any action, execution shall not be stayed or delayed by proceedings in error, or supersedeas *445] thereupon, *without the special order of the court or a judge*, unless the person in whose name such proceedings in error be brought, with two, or by leave of the court or a judge, more than two, sufficient sureties, such as the court (wherein such judgment is or shall be given) or a judge shall allow of, shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the party for whom any such judgment is or shall be given, by recognisance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said judgment (except in case of a penalty, and, in case of a penalty, in double the sum really due, and double the costs), to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein), all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution, and shall give notice thereof to the defendant in error, or his attorney." The words "*in like manner and to the same amount*," it is submitted, refer to the number of sureties and the sum, and not to the whole of the clause relating to bail in error so as to incorporate the discretion to dispense with it. [BRIERLEY, J.—According to your construction, the court may dispense with bail

where the matter is on the record, but not where it only comes before the court of error on appeal.] That, no doubt, is so. Assuming that the power to dispense with bail exists, what is there in this case to call for its exercise? The only grounds upon which it is asked, are, that the defendant is a public officer, and as such has given bond for his good behaviour, and that he has a salary of 1000*l.* per annum. Is an officer *of the court of bankruptcy to have a privilege [446 which no other officer of any other court has? In the case of *Cox v. The Corporation of London*, the Court of Exchequer expressly refused to dispense with bail in error, though informed that the corporation had never been called upon to put in bail in error. [ERLE, C. J.—We do not usually interfere with the exercise of a judge's discretion.] This is more than an exercise of discretion.

A rule nisi having been granted,

Gates, who appeared to show cause, was stopped by the court.

Quain was heard in support of his rule.

ERLE, C. J.—I think this rule should be discharged. No reason can be suggested for a distinction in this respect between bail in error and bail on appeal. If Mr. Quain's argument were to prevail, it plainly would be in consequence of a mere act of improvidence or omission on the part of the legislature. I think there is no foundation for the argument. And, if I am to enter into the question of discretion, I cannot say that it has not been well exercised. Here is a public officer, discharging a public duty, fairly trying an important question affecting his office. If bail could in any case be dispensed with, I should have thought it well might be in such a case.

The rest of the court concurring,

Rule discharged.(a)

(a) The costs of the rule were directed to abide the event of the appeal.

*COPLEY v. HEMINGWAY. Nov. 8. [447

Article 7 of the Directions to the Taxing Masters, of Hilary Term, 1853, applies to the costs of a defendant who obtains a verdict in a cause tried before the Secondary, where the sum awarded on the writ does not exceed 20*l.*

THIS was an action to recover damages for undue delay in the unloading from a vessel belonging to the plaintiff a cargo of stone consigned to one Henry Booth, a stone-merchant having a wharf on the river Thames above London Bridge. There was no charter-party, nor any bill of lading of the cargo: and the plaintiff sued the defendant as the shipper of the cargo, on an implied contract to receive the cargo within a reasonable time after the arrival of the vessel in the port of London. The declaration contained a special count in which the plaintiff claimed as damages the expenses he had incurred in keeping the crew, &c., and also a count for demurrage. The plaintiff's claim was for ten days' detention, at 2*l.* per day. A summons to show cause why the cause should not be tried before the sheriffs of London, taken out by the plaintiff, was opposed by the defendant, on the ground that the plaintiff's claim in the action involved a question of great importance to persons engaged in the Yorkshire stone trade, and involved the proof of the custom as to the unloading of vessels

in that trade arriving in the port of London and discharging their cargoes at stone-wharves above bridge. The order was however made, and the cause was tried before the Secondary of London on the 2d of September last, when a verdict was found for the defendant.

On taxation of the defendant's costs, the defendant claimed to have them allowed upon the higher scale. No certificate affecting the costs was granted or applied for at the trial. The Master taxed the costs upon the lower scale, pursuant to the "Directions" of Hilary Term, 1858.

*448] *Prentice* moved for a rule calling upon the plaintiff to show cause why the Master should not be at liberty to review his taxation. He submitted, that, notwithstanding the general heading of the schedule annexed thereto, the 7th article of the "Directions to the Taxing Masters," of Hilary Term, 1853, was confined to the *plaintiff's* costs. The words are,—“In all actions on contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*. (without costs), *the plaintiff's costs* as against the defendant shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed.” These directions, he submitted, did not apply to actions for unliquidated damages, like the present. [BYLES, J.—The defendant appeared before the Secondary, and the cause was tried.] The order having been made in the vacation, the defendant had no opportunity to come to the court to set it aside. [BYLES, J.—It never could have been intended that, if the plaintiff succeeded, he should receive costs on the lower scale, and pay on the higher scale if he failed.] *Mason v. Tucker*, 4 Hurlst. & N. 536, was referred to.

ERLE, C. J.—I think there ought to be no rule in this case. The defendant's costs were properly taxed on the lower scale. The sum claimed by the writ was 20*l*. only. Article 7 of the directions referred to in terms restricts the plaintiff to costs upon the lower scale where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of *449] the action, shall not exceed 20*l*. Taking that in connection with the schedule, which provides for general allowances for both plaintiffs and defendants, I think it was obviously the intention of those who framed these directions, that, where the sum in dispute and endorsed on the writ does not exceed 20*l*., the defendant's costs, if he succeeds, shall also be taxed according to the lower scale. It is said that the case was not one which could properly be tried before the inferior judge. But my Brother Keating made an order that the cause should be tried before the Secondary. It was so tried. The defendant appeared, and obtained a verdict: and he afterwards went before the Master to tax his costs. It is too late for him now to object that the cause was not triable before the Secondary.

WILLIAMS, J.—I am entirely of the same opinion. We must assume that the cause was properly tried. The only question is, whether the costs were properly taxed upon the lower scale. I am

clearly of opinion that the Directions apply to the defendant's costs as well as to the plaintiff's.

BYLES, J.—I am of the same opinion. The heading of the schedule shows that both plaintiff's and defendant's costs were contemplated. Where it was intended otherwise in these Directions, it is so expressed.(a)

KEATING, J., concurred.

Rule refused.(b)

(a) Article 8 provides, that, "where, in like actions, the sum endorsed on the [writ of] summons shall be more than 20*l.*, but the plaintiff fails to recover more than that sum, and the judge does not certify as aforesaid,† the plaintiff's costs against the defendant, whether between party and party or as between attorney and client, shall be taxed as upon a writ of trial before a judge of a court of record where attorneys are not allowed to act as advocates, as hereinafter provided for; but the defendant's costs, if any, are to be taxed upon the higher scale: Provided, that, in cases triable before the sheriff or judge of an inferior court, where the judge shall refuse to make an order for such trial, the judge may, if he shall think fit, direct at the time of such refusal on what scale the costs of each party shall be taxed; and, in default of such direction, the costs of both parties shall be taxed on the higher scale."

(b) See *Perry v. Bennett*, 14 C. B. N. S. 402 (E. C. L. R. vol. 108).

† "That the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court."

THE LONDON AND SOUTH WESTERN RAILWAY COMPANY v. ANN WEBB. Nov. 5, 25.

A railway company having conveyed to A. a piece of land abutting on their viaduct, with a covenant not to build within six feet of the wall of the viaduct,—the court, in an action against A.'s widow (who took by assignment) for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building; it appearing that it had been erected by her under-tenant, and consequently that she could not obey the writ, if granted.

THE 79th section of the Common Law Procedure Act, 1854, enacts, that, "in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided (ss. 68-74) with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

The 81st section enacts that "the proceedings in *such ac- [*451 tion shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and, in case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge."

And the 82d section enacts that "it shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply ex parte to the court or a judge for a writ of injunction to restrain the defendant in such action from the repe-

tion or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just; and, in case of disobedience, such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge: Provided always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order."

C. Wood moved, pursuant to the above provisions, for a writ of injunction under the following circumstances:—By an indenture of the 12th of July, 1849, the London and South Western Railway Company *452] granted and conveyed to Thomas Webb in fee a piece of ground on the north side of the Westminster Bridge Road, Lambeth, abutting on one side on the viaduct of their railway: and Webb in and by the said indenture covenanted, amongst other things, "for himself, his heirs, executors, administrators, and assigns, and so as to bind not only himself and themselves, but all and every persons and person who should from time to time thereafter be seised of or entitled to the hereditaments and premises intended to be thereby conveyed or otherwise assured," with the company, "that the said Thomas Webb, his heirs or assigns, or any person or persons who might lawfully or equitably claim through or under him or them, should not at any time thereafter erect any buildings of any kind any part of which should be nearer than six feet to the face of the viaduct of the London and South Western Railway on any part of the ground intended to be thereby conveyed which was shaded with black lines on the plan in the margin of the indenture, without the consent in writing of the company, under the hand of their secretary, first had and obtained." And it was thereby declared that "it should be lawful for the company, their successors and assigns, and their architects, engineers, officers, servants, agents, workmen, and other persons who might be employed by the said company, from time to time and at all times thereafter to enter into and upon such part or parts of the land and hereditaments intended to be thereby conveyed, as might be necessary or expedient, for the purposes of viewing and examining the state of the piers of the arches and other works of or belonging to the said railway, and for ascertaining whether the covenants in the said indenture contained on the part of the said Thomas Webb, his heirs and assigns, to be observed and performed, should be truly ob- *453] served and performed according to the true intent and meaning thereof; and also for the purpose of pointing, maintaining, upholding, repairing, and rebuilding or otherwise reinstating the said railway, or any part or parts thereof, or any of the piers or arches belonging thereto, and for the purpose of erecting, placing, or setting up any scaffolding or shoring, and of carting, drawing, or otherwise conveying or depositing or placing any materials or other things in or upon the ground and premises intended to be thereby conveyed or otherwise assured, for the purpose of or relating to such pointing.

maintaining, upholding, repairing, or rebuilding, or otherwise reinstating, without any eviction, interruption, let, suit, or denial whatsoever of, from, or by the said Thomas Webb, his heirs or assigns, or his or their tenants or occupiers, or any other person or persons whomsoever who might lawfully or equitably claim through or under him or them or any of them."

All the right and title of Thomas Webb in the premises subsequently came to the defendant as assignee; and whilst she was assignee one David Bliss who claimed under her built a shop on the piece of land, part of which was nearer than six feet to the face of the viaduct and on part of the ground intended by the above indenture to be conveyed and which was shaded with black lines on the plan in the margin of the indenture, without the consent of the company. The company thereupon brought this action against the defendant for a breach of the covenant above set out, claiming a writ of injunction in the terms of the statute. The defendant suffered judgment by default.

The learned counsel stated, that, it being doubtful whether an injunction could be granted by this court against the tenant (Bliss), he confined his application to the defendant herself. [BYLES, J.—If we granted what you ask, we should be enjoining the defendant to do that which would amount to a trespass.] If she has *by her own laches placed herself in that position, it is her own fault. [*454] [BYLES, J.—The 82d section says that "such writ may be granted or denied by the court." We are not to grant it unless we think it a fit case. The soil of the six feet is not in the company.] No. It was conveyed by them to the deceased husband of the defendant, with a covenant not to build thereon. [BYLES, J.—The proper course will be to apply to the Court of Chancery, which might have the tenant before it and make such order as should appear to it upon the whole to be just. This we have no jurisdiction to do. If we made the order upon the defendant as prayed, we should be enjoining her to do that which would make her a trespasser.] Is injustice to be done to the plaintiffs, and ruinous delay and costs to be inflicted upon them, because the defendant has not thought fit to secure herself against a breach of the covenant by her tenant?

ERLE, C. J.—We cannot order a writ against the tenant. And I do not feel disposed, in the exercise of my discretion, or justified in commanding the defendant under the circumstances brought before us to do that which would amount to an act of trespass on her part.

The rest of the court concurring,

Rule refused.

Wood renewed his application on a subsequent day, upon a further affidavit of the resident engineer of the company, who stated, that, in his opinion, it was absolutely necessary for the due and proper management and examination of the railway, and the due, proper, and *safe working thereof, that the portion of land shaded with black lines on the plan annexed to the before-mentioned conveyance (the six foot space) should be at all times kept clear from any building or erection thereon, so as to enable the company by their agents at any time to enter into and upon the land conveyed by the above-mentioned indenture, for the purpose of viewing and examining the

state of the piers of the arches and other works of the company adjoining to and under the land so sold to the said Thomas Webb, deceased, as referred to in the deed: that it was, in his opinion, necessary for the preservation of the said viaduct and the safety of the traffic on the railway at once to enter into and upon the said land so shaded black as aforesaid, for the purpose of pointing, maintaining, upholding, repairing, and otherwise reinstating the said viaduct or parts thereof adjoining thereto, and for the purpose of erecting, placing, or setting up scaffolding or shoring, and of carting, drawing, or otherwise conveying and depositing or placing materials and other things thereon as might be found necessary for such purpose, which it was not possible to do while the buildings complained of remained on the said land: and that, so long as any building of any kind was permitted upon any part of the said piece of ground which should be nearer than six feet to the face of the viaduct, no proper examination or reparation could be had or done to the said viaduct adjoining to and under the land so conveyed to the said Thomas Webb as aforesaid.

The learned counsel submitted that the facts sworn to brought the case expressly within the 82d section; that, in administering relief under that section, the court would be guided by the principle on which such relief is granted in equity, viz. that the recovery of damages at law would not give a perfect compensation: *see *Wilkins v. Aikin*, 17 Ves. 422; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Broadbent v. The Imperial Gas Company*, 2 Jurist, N. S. 1132; *Hodgson v. Duce*, 2 Jurist, N. S. 1014; *Earl Talbot v. Hope Scott*, 27 Law J. Ch. 273; *North v. The Great Northern Railway Company*, 2 Giff. 64; and that no private arrangement which the defendant had thought fit to enter into with her tenant ought to be permitted to interfere with the plaintiffs' right. [KEATING, J.—Why not assess your damages, and take the defendant in execution?] The damages would be merely nominal. [BYLES, J.—You might have a further action for continuing damage.] A difficulty would arise as to costs. [ERLE, C. J.—Go to the Court of Chancery, where all the parties may be heard, and full justice done.] Why should the plaintiffs be driven to the Court of Chancery at great delay and expense, when the statute entitles them to the same relief in the action? What was this power given to the courts of common law for? [ERLE, C. J.—Not to be made an instrument of oppression,—not to compel a party to do that which we see he cannot do.]

PER CURIAM.

Rule refused.(a)

(a) See *Ringland v. Lowndes*, ante, p. 173, where the court exercised the jurisdiction given to them by the mandamus clauses of the Common Law Procedure Act, 1854.

*457]

*MORRISON v. WOOKEY. Nov. 18.

It is not necessary to have a copy of the judge's notes at the time of moving for a new trial in a case tried, under a judge's order, before a county court.

THIS was an action which was tried, under a judge's order, before the judge of the Liverpool county court. A verdict having been found for the plaintiff,

Raymond, on a former day in this term, obtained a rule nisi to enter a verdict for the defendant on the first issue, or for a new trial on the ground of misdirection and that the verdict was not warranted by the evidence.

Williams, who appeared to show cause, took a preliminary objection, viz. that, at the time the rule was obtained, the defendant had not procured a copy of the judge's notes. He referred to Chitty's Practice, 11th edit., vol. 1, p. 427, where it is said that "the motion for a new trial (a) should be supported by the production of the notes of the under-sheriff or of the judge who tried the cause, verified by affidavit, or by the production of an examined copy of such notes, together with an affidavit verifying such copy to be a true one." [ERLE, C. J.—It is not necessary to be furnished with the notes at the time of moving: it is enough if they are produced when cause comes to be shown.]

The notes and the affidavits proving to be insufficient in the result to sustain the rule, it was discharged. Rule discharged.

(a) Before the sheriff, &c., under the 3 & 4 W. 4, c. 42, s. 17.

***ELDRIDGE v. STACEY and Others. Nov. 6. [*458**

There is no illegality in distraining for rent by climbing over a fence, and so gaining access to the house by an open door.

The broker having been forcibly expelled, regained possession by force after an interval of three weeks:—Held, that he was justified in so doing; and that it was a question for the jury whether by staying out so long he had abandoned the distress.

THIS was an action for a wrongful distress. The cause was tried before Bramwell, B., at the last Summer Assizes at Croydon. The facts which appeared in evidence were as follows:—The plaintiff was tenant under the defendant Stacey of premises at Vauxhall, in the county of Surrey. Rent being in arrear, the other defendants were employed to distrain. On the 6th of November, 1862, the broker, in the absence of the tenant, got over the fence from the adjoining garden, and entered the house by the back door, which was only latched, and then forced upon the front-door and admitted his assistant, whom he left in possession. The tenant, on his return home on the same day, forcibly expelled the man: and on the 26th of November, the broker resumed possession, by breaking open the front-door with a sledge-hammer.

For the defendant it was submitted that the original entry by getting over the fence was unlawful; and that, assuming it not to have been so, the broker had at all events, by remaining out of possession for three weeks, abandoned the distress, and consequently was not justified in entering by force on the second occasion for the purpose of retaking it.

The learned judge ruled that there was nothing illegal in the mode of taking the distress; and that, having been forcibly expelled, the broker was justified in re-entering by force, unless he had abandoned the first distress,—which question he left to the jury.

The jury having found that the distress was not abandoned, a verdict was entered for the defendants.

*459] *Laxton* now moved for a new trial, on the ground of *misdirection, and that the verdict was against the evidence. The original entry was clearly wrongful. [ERLE, C. J.—Have you any authority for saying that the broker could not lawfully get over the fence to distrain?] In Co. Litt. 121 a., it is said,—“The lord cannot break open the gates, or break down the enclosures, to take a distress, and therefore the law accounts it a disseisin.” In *Brown v. Glenn*, 16 Q. B. 254 (E. C. L. R. vol. 71), it was held that a landlord cannot break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent. And the case of *Ryan v. Shilcock*, 7 Exch. 72, shows that the landlord can only enter, for the purpose of distraining, in the ordinary way in which other persons enter. By remaining out of possession for twenty-one days, the landlord must be assumed to have waived the distress. The finding of the jury upon that point was not warranted by the evidence.

ERLE, C. J.—I am of opinion that there should be no rule.—I do not think the distress was rendered unlawful by the broker getting over the fence. None of the authorities cited warrant such a conclusion. Then, if the party left in possession was put out by force, he was justified in resorting to force in order to regain possession,—unless, indeed, he had abandoned the original distress. That, however, was a question for the jury. It was left to them; and they have disposed of it.

The rest of the court concurring,

Rule refused. (a)

(a) See *Hancock v. Austen*, 14 C. B. N. S. 634 (E. C. L. R. vol. 108).

*460] *HEAP and Others v. DOBSON. Nov. 6.

A., B., and C., agreed that each should furnish 3000*l.* worth of goods, to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments:—Held, that this did not constitute a partnership between the three, so as to make B. and C. responsible for goods bought by A. to furnish his quota of the cargo.

THIS was an action for goods sold and delivered. Plea, never indebted.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were as follows:—Pearson, of Hull, was the owner of a vessel called *The Peterhoff*, with which he, Dobson, and one C. had had profit and loss transactions. Pearson representing to them that he had a cargo of cotton, turpentine, and other goods on the southern coast of the United States, it was by an agreement dated the 29th of May, 1862, arranged that the *Peterhoff* (which was chartered to Dobson) should go out for the purpose of bringing them home on joint account of the three, and that goods to the amount of 3000*l.* should be shipped by each of the three for an outward cargo, and sold on joint account, the profit of each on the outward cargo to be according to the value of the goods shipped by each. Accordingly, Dobson, who was a wine and spirit-merchant, put on board wines and spirits to an amount exceeding

3000*l.*, C. also shipped 3000*l.* worth of other goods, and Pearson shipped, amongst other things, goods to the amount of 1377*l.* 5*s.*, which he had obtained on credit from the plaintiffs. Pearson having become bankrupt, the plaintiffs discovered that the goods were shipped as a joint adventure, and accordingly sued Dobson for the price.

Pearson, who was called as a witness, swore that he had no authority to pledge the credit of his co-adventurers, otherwise than as might be implied from the agreement.

On the part of the plaintiffs, it was insisted that *this was a joint-adventure, and constituted a joint liability in the three as [*461 partners.

His Lordship, however, was of opinion that the purchase of the goods was the separate adventure of each, and that the circumstance of their having a joint interest in the result of the transaction did not constitute such a relation between them as to give either of them authority to pledge the credit of his co-adventurers for the goods to be supplied by him. He thereupon directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter the verdict for them for 1377*l.* 5*s.*, if the court should be of opinion that the agreement of the 29th of May, 1862, constituted a partnership between the defendant, Pearson, and C.

Lush, Q. C., now moved accordingly.—He submitted that the outward cargo having been put on board the *Peterhoff* as the joint adventure of the three, notwithstanding the private arrangement between themselves, they were quoad third persons clothed with all the authority and responsibility of partners, and consequently each of the three was liable for the whole amount of the goods shipped on the joint account. [BYLES, J.—If the agreement had been that each of the three should contribute to the joint adventure 3000*l.* in money, instead of that amount in goods, you would hardly have contended that Dobson would have been responsible to the person from whom Pearson borrowed his 3000*l.* to come into the concern.] That would be a different thing. The case of *Kilshaw v. Jukes*, 32 Law J., Q. B. 217, approaches very nearly to this. There, A., an ironmonger, having supplied ironmongery to the amount of 189*l.* to B. and C., who were builders, agreed to join them in the purchase of some land for building, on the conditions that B. and C. should build* the [*462 houses, A. supplying the ironmongery required, and that, on the completion and sale of the houses, A. should be paid the 189*l.*, the price of the ironmongery, and no more, and that, if no profit was realized, A. should be a loser. An agreement was accordingly entered into by all three with the landowner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the building, and the three being jointly bound to pay the purchase-money, and the conveyance when all was paid to be to the three, or as they should direct. B. and C. having ordered timber of the plaintiff, it was supplied on their credit (the plaintiff being ignorant of A.'s having any interest in the building), and it was used on the building. It was held by Blackburn, J., and Mellor, J.,—Wightman, J., dissenting, that A. was

not jointly interested with B. and C. in such a way as to make him a partner and liable for the timber. Wightman, J., there says: "The timber, though supplied by the plaintiff upon the application of two of the defendants only, and upon their credit, was ordered and used by them for the performance of a work to be executed by them jointly with Jukes, and for his as well as their benefit. It is true, as between themselves, Wynn and Till were to do the work: but Jukes was as much bound to do it as they were. What they did was in order to fulfil a contract which the three were jointly bound to perform." That, it is submitted, is precisely the case here.

WILLIAMS, J.—I am of opinion that there should be no rule in this case. There is nothing in the arrangement to authorize one of the three to bind the others as their agent in respect of the third share of *463] the cargo *which he undertook to supply for the joint adventure. There clearly was no partnership.

BYLES, J.—I am of the same opinion. Each of the parties was to furnish 3000*l.* worth of cargo, which was to be on joint account thereafter. That clearly did not give Pearson any authority to bind his co-adventurers for a contract made by him for the purchase of his proportion of the cargo.

ERLE, C. J.—I retain the opinion I expressed at the trial.

Rule refused.

SMURTHWAITE v. RICHARDSON and Another. Nov. 25.

The court will not allow an amendment so as to introduce a new cause of action, where a cause has been referred by consent under an order which does not reserve power to the arbitrator to amend. Nor will they permit the plaintiff to revoke the submission,—there being no suggestion of any breach of faith on the part of the defendants.

THIS was an action brought by the plaintiff, a merchant at Sunderland, against the defendants, shipbuilders at Low Walker, near Newcastle-upon-Tyne, to recover damages for the alleged breach of a contract for the building of a ship. The original contract was made on the 24th of April, 1860. The material parts of it were as follows:—

"It is hereby agreed that the said J. W. Richardson & Co. are to build for the said John Smurthwaite the hull, masts, and spars of an iron clipper sailing vessel to class twelve years A. 1, at Lloyds. [Then followed the specification, price, and terms of payment.] The said ship to be completed and delivered as above on or before the 5th day of December next."

On the 5th of July, 1860, the time for the completion of the vessel was extended by mutual consent to the 5th of February, 1861.

One vessel was not complete on the last-mentioned day; but notwithstanding such breach of their *contract on the part of the *464] defendants, the plaintiff permitted them to proceed with the construction of the vessel, subject to whatever claim he might have against them in respect of their failure to complete her within the extended time.

On the 20th of March, 1861,—the vessel being then nearly completed, and her launch being confidently expected by both parties

within a week,—the plaintiff entered into a sub-contract with one John Pantaleone Schilizzi, for the sale of the vessel to him for a certain sum,—“the said ship to be guaranteed and classed twelve years A. 1, at Lloyds:” and it was agreed that the former agreement (between the plaintiff and defendants) should “form part of that agreement.” The last-mentioned contract was accompanied by a memorandum of extras and alterations which Schilizzi required to be supplied and made; and by that memorandum the period of *two months from the launching* of the vessel was fixed as the time for her delivery to Schilizzi.

The defendants had notice of the above-mentioned contract with Schilizzi: and thereupon the following memorandum was endorsed upon the memorandum of extras and alterations, and signed by the plaintiff and the defendants:—

“It is mutually agreed between John Smurthwaite and John W. Richardson & Co., that, on the said John Smurthwaite agreeing not to claim demurrage for overtime, the said J. W. Richardson & Co. will supply the extras and alterations as above described; and the said John Smurthwaite agrees to make the final payments as per agreement within eight days after launching, when the builder’s certificate will be handed over and the ship transferred to the said John Smurthwaite. This agreement is in no way to vitiate the contract above referred to.”

*The launch of the vessel took place on the 26th of March, [465 1861: but she was not delivered complete with the extras and alterations and in all other respects according to the original contract until the 6th of July; and consequently the plaintiff was unable to perform his contract with Schilizzi. The cause of the delay was, that Lloyds’ surveyor required the masts to be strengthened before he would certify for her classification.

Schilizzi thereupon sued the plaintiff for his breach of contract. The now defendants had notice to come in and defend that action, which they refused to do. The plaintiff, having no defence to the action, agreed to refer the amount of damages to arbitration, and an award was made in favour of Schilizzi for 400*l.* 10*s.* 6*d.*, and costs, which latter amounted to 11*l.* 19*s.*, which, together with his own costs of defence (120*l.*), the plaintiff paid.

The present action was then brought to recover from the defendants the damages and costs above mentioned, as well as for the recovery of general damages for the defendants’ breach of contract. The defendants also brought a cross-action against the plaintiff for the price of certain extras: and it was agreed to refer both actions to Mr. Price, Q. C.

By the order of reference, it was, amongst other things, directed that the arbitrator should be at liberty, at the request of either party, and before making his award or certificate, to state a special case for the opinion of the court upon any point of law which might be raised before him in the course of the said reference; and that the arbitrator should be at liberty to find generally for the plaintiff or for the defendants without finding on any of the specific issues joined in the said cause, unless otherwise requested by either of the said parties. It was further ordered that the *parties should produce and admit before the arbitrator all contracts, &c., relating to the ship, and [466

also the contract between the plaintiff and Schilizzi, "and the proceedings, order of reference, award, and bills of costs both of plaintiff and defendant in the action brought by Schilizzi against the now plaintiff." *But the order of reference contained no power for the arbitrator to amend the pleadings.*

Whilst the reference was proceeding, the plaintiff discovered that the declaration was defective in not containing any averment of a breach of the contract in respect of time. The defendants refused to consent to any amendment. But it was ultimately arranged that the arbitrator should take all the evidence upon the assumption that the declaration and replication had been actually amended, and postpone the making of his award in order to give the plaintiff an opportunity of making such application to the court as he should be advised.

S. Temple, Q. C., accordingly, on a former day in this term, moved for a rule calling upon the defendants to show cause why the declaration should not be amended, or why the order of reference should not be amended by giving the arbitrator therein named all powers of amendment of a judge at nisi prius; or why the plaintiff should not be at liberty to revoke the submission, unless the defendants would consent to such amendments being made as the court should think fit. [ERLE, C. J.—What evidence have you that it was in the contemplation of the parties to refer the matter as altered by the proposed amendment?] In *Alder v. Pack*, 5 Dowl. P. C. 16, a plea of judgment recovered puis darrien continuance was allowed to be added pending a reference. [BYLES, J., referred to *Gibbs v. Knightly*, 2 *467] *Hurlst. & N.* 34, and *Thompsett v. Bowyer*, *9 C. B. N. S. 284 (E. C. L. R. vol. 99), where the Court of Exchequer and this court amended orders of reference.] There were expressions found there which are not in this order.

A rule nisi having been granted,

E. James, Q. C., and *Bruce*, now showed cause.—The court has no power to do that which is asked. The order of reference was made by consent. Time and delay formed no part of the cause of action which the defendants have consented to refer. The proposed amendment introduces a totally different matter, and one which possibly the defendants would never have consented to refer. All that this court did in *Thompsett v. Bowyer*, was, to hold that "usual terms," includes a power to the arbitrator to amend: and Erle, C. J., in giving judgment, says he entirely agrees "that the parties to the agreement have a right to make what bargain they please, and that the court has no power to add to or subtract from what they have so mutually agreed." *Morgan v. Tart*, 11 Exch. 82, is a still stronger case. It was there held, that, where a cause is referred to arbitration without power of amendment, a judge has no power, except by consent of the parties, to order the particulars of demand specially endorsed on the writ to be altered by increasing the amount of one of the items.

Temple, Q. C., *Udall*, and *Lewers*, in support of the rule.—It may be that the amendment prayed is unnecessary,—the words "according to the said agreement" sufficiently involving time. [BYLES, J.—The amendment is either unnecessary or it is unauthorized.] Since the Common Law Procedure Act, 1852, the power of the court to amend is almost without limit. Assuming that the court cannot grant the

amendment prayed here, they will at all events allow the plaintiff *to revoke the submission, unless the defendants will consent to the record being amended so as to put in issue the matter [*468 really in contest between the parties.

ERLE, C. J.—We have no power to make the parties refer that which they never consented to refer. I think the defendants had a right to look at the cause of action alleged in the declaration, and refer that; and that they had a right to refuse to refer any question of liability arising out of the plaintiff's contract with Schilizzi. Nor will we give leave to revoke a submission, unless satisfied that there has been a breach of faith on the other side.

The rest of the court concurring,

Rule discharged, the defendants' costs of the application to be costs in the cause.

ALLARD *v.* BOURNE and Others. Nov. 9.

A benefit building society is bound by orders for necessary repairs given by the secretary though not sanctioned by the number of trustees required by the rules for transacting the ordinary business of the company, or entered in the minute-book.

THIS was an action brought by the plaintiff to recover the price of certain work done by him in repairing certain houses of which the defendants, as trustees of a benefit society established under the provisions of the 6 & 7 W. 4, c. 32, called The Planet Benefit Building and Investment Society, were mortgagees. The plaintiff claimed 39*l.* 14*s.*

The cause was tried before Keating, J., at the *sittings in Middlesex after last Easter Term. It appeared that certain of [*469 the repairs, which amounted to 29*l.* 14*s.*, had been done by the plaintiff on the order of one Spurgeon, the then secretary of the society. And Spurgeon, who was called as a witness, swore that he as agent for the society was in the habit of giving orders for small repairs, that he did not think it worth while on this occasion to incur the expense of calling a meeting of the directors to discuss the matter, but that he had mentioned the subject of these repairs to two of the directors, and they approved of their being done.

On the part of the defendants, it was submitted that the plaintiff was not entitled to recover in respect of the repairs which had been done upon Spurgeon's orders, such orders not being warranted by the rules of the society.

The rules provided, amongst other things, that the society should be managed by a board of not less than nine or more than twelve directors,—of whom five to compose a board; that the directors should meet as often as the business of the society should require their attention, and that they should order the payment of all moneys due from or to be advanced by the society, such order to be entered in the minute-book and signed by the chairman; that the directors should have power to appoint agents or other officers; that each director who should attend the meetings of the board should be allowed the sum of 5*s.*; that the

secretary should enter minutes of all resolutions and the business of the society in a rough minute-book, the same to be copied fairly into another, to be read as part of the business of the next meeting, and to be signed by the chairman; that the secretary should give immediate information to the chairman of anything that might come to his knowledge, which he apprehended *would be of advantage or
 *470] disadvantage to the society, in order that they might deliberate thereon, &c. It did not appear that any entry had been made of the repairs in question in the minute-book.

The learned judge left it to the jury to say whether or not the work had been done upon the order of a duly-authorized agent of the society. The jury found that it had, and accordingly returned a verdict for the plaintiff for the sum claimed.

Huddleston, Q. C., in Trinity Term last, obtained a rule nisi to reduce the verdict by the sum of 29*l.* 14*s.* for work done to one of the houses, on the ground that there was no evidence to show that any authority was given by the defendants to execute the repairs in question, so as to fix them with liability.

Shee, Serjt., and *G. Evans*, now showed cause.—There is no doubt that Spurgeon, by whom these repairs were ordered, was the agent of the society, and that the society had the benefit of them. But the contention on the part of the defendants will be, that, in order to authorize Spurgeon to give the order, there should have been an entry in the minute-book, signed by the chairman at a meeting of the directors or trustees consisting of five at least. Is there anything in the rules to warrant that? A corporation commonly contracts by seal; but for ordinary matters of routine orders may be given without that formality. These repairs were matter of obvious necessity: rent could not be received from the premises unless they were done. The directors (two of them, at least,) were aware of the order given by their secretary, and they expressed their approval. [ERLE, C. J.—I am at a loss to see why the defendants should not pay for work
 *471] *which has been done for them, as found by the jury.]

Waddy (with whom was *Huddleston*, Q. C.), in support of the rule.—The duties of the secretary are defined by the rules of the society. He could not order these repairs in the manner he did, so as to bind the trustees. [KEATING, J.—Is there any rule prohibiting the trustees from ordering repairs otherwise than by a minute in writing?] No: but there is nothing to authorize *two* of them to do so. [*Shee*, Serjt.—The order for payment is to be entered in the minute-book; but nothing is said about the order for the work.] In *Ridley v. The Plymouth, Stonehouse, and Devonport Grinding and Baking Company*, 2 Exch. 711, the company was held not to be bound by contracts entered into by their secretary unsanctioned by the prescribed number of directors. The plaintiff was himself a member of the society, and therefore perfectly conversant with its rules.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought to recover the price of certain repairs, and it is clear that the defendants, who are trustees of this building society, have had the benefit of the work upon property belonging to them. The order was given to the plaintiff by the secretary, and the plain-

tiff did the work in the full belief that the secretary was authorized to order it. There was also good evidence that the trustees were aware that the work was being done: but they now say, that, because certain formalities have not been complied with, they will not pay for it. I think the argument fails in point of fact. I find no rule which precludes the secretary from giving such orders as these. He says he was secretary and general agent of the society. It *would, I think, be extremely inconvenient if for every item of repair [*472 required to any premises possessed by the society, for every broken window, a board of directors must be convened, each of whom is to be paid 5s. for coming to the meeting, to authorize it. I think the jury were well warranted in finding that the trustees knew that the work was being done and that they sanctioned it: and I find nothing in the rules to disable the plaintiff from recovering.

WILLIAMS, J.—I am of the same opinion. I think the jury might well have arrived at the conclusion that there was an original authority in the secretary to order the repairs in question. But, if that were not so, there was abundant evidence that the trustees were aware of the work having been done, and that it was for their benefit, and that they assented to it. To hold them liable under these circumstances, is not going nearly so far as this court went in *Smith v. The Hull Glass Company*, 11 C. B. 897 (E. C. L. R. vol. 73). There, a company established for the manufacture of glass had power under a clause in their deed of settlement to appoint a manager of their works and factories, to “superintend and transact, under the control of the board of directors, the manufacturing business of the company,” and to whom the board of directors were by another clause authorized to delegate “such and so many of the powers thereby given to them as would enable him to carry on the said works and manufacturing business in an efficient manner: and it was held, that the company were liable for goods supplied to them for the purposes of their manufactures, upon orders given by such manager, although there was no express delegation of authority; and that they were also liable for goods supplied upon the orders of unauthorized persons,—such as, the chairman, deputy-chairman, and *secretary,—where the goods were with [*473 their knowledge received upon their premises, and used by them for the purposes of their trade. Jervis, C. J., in giving judgment, says: “The ground upon which I am disposed to hold the company liable in respect of the goods supplied on the orders of the chairman, the deputy-chairman, and the secretary, is, that these orders were subsequently adopted by the directors. The goods were delivered upon the premises, to persons acting in the management of the business of the company, and, it must be assumed, with the knowledge of the directors, and were used in the manufacture for which the company was established. That would be equivalent to a fresh order by the directors, and would entitle the plaintiffs to recover. There is no pretence for saying that it was necessary the orders should be given by ‘a board.’”

BYLES, J.—I am of the same opinion. Assuming that a less number than five directors at a board could not legally give an order, it is clear that they may appoint agents. The rules give them an unqualified and unlimited power to appoint agents. They are a

not be held to be taken away from them by the mere silence of the act. The natural inference would be, that, as the statute makes no mention of infants, it did not intend to alter the law with respect to them, but to leave them in the enjoyment of all the protection and immunity which they have always enjoyed. [BYLES, J.—It is quite clear that the Common Law Procedure Act binds married women. But there is this difference between the case of a married woman and an infant,—the former may appear, the latter cannot.]

PER CURIAM.—The proceedings must be set aside, but without costs on either side. Rule absolute accordingly.

REGISTRATION CASES.

MICHAELMAS TERM, 1863.

NORTHAMPTONSHIRE.—Southern Division.

FRANCIS CHARLES ROBINSON, the Younger, Appellant;
THOMAS DUNKLEY and **WILLIAM LOWE**, Overseers of the
Parish of St. Sepulchre, Respondents. *Nov. 17.*

A. was a member of a freehold land and building society, in which he held one share. The society some years since advanced for him the purchase-money (73*l.*) for a piece of land, the annual value of which, for building purposes, was 3*l.*; and A. mortgaged it to the society to secure the monthly payments due upon his share, amounting annually to 4*l.* Before the 31st of January, A. had paid monthly instalments to the amount of 71*l.*

Upon these facts, the revising-barrister found that A. had prior to the 31st of January, a freehold estate of the value of 40*s.* per annum (above all charges), and retained his name on the list of voters:—Held, that his decision was right.

Remarks upon the case of Copland, app., Bartlett, resp., 6 C. B. 18, 2 Lutw. Reg. Cas. 183.

At a court held for the revision of the lists of voters for the parish of St. Sepulchre, Northampton, Francis Charles Robinson, the younger, duly objected to the name of Charles Derby being retained on the list of voters for the said parish. The name of Charles Derby appeared upon the list of persons claiming to be entitled to vote, thus,—

Christian name and surname of each voter.	Place of abode.	Nature of qualification.	Street, lane, &c., where the property is situate, &c.
Derby, Charles.	34, Marefair, Northampton.	Freehold building-land.	Marriott St. Kingthorpe Road, Northampton.

The facts of the case as proved were as follows:—

Charles Derby is a member of a freehold land and building society, in which he held one share. The society advanced the purchase-money of the land, 73*l.*, some years since, and the voter mortgaged the property to them to secure the monthly payments due upon his share, amounting annually to 4*l.* Upon failure of the payment by

the member of his instalments for a certain *limited period, the society is entitled either to suspend enforcement of payment or to enter upon possession, and the member is entitled to redeem the premises by the payment of these monthly instalments alone, without any other payment of principal. The funds of the society arise out of the monthly payments of the members; which are for the proportional benefit of the members. It was proved that the whole money paid up by the claimant was 73*l.*; and that the annual value of the property was 3*l.*, for building purposes; and that, during the past year, ending in June last, he had paid instalments back to the society to the amount of 4*l.*, 2*s.* whereof had not been paid before the 31st of January last. [*479]

It was contended on the part of the objector, that the annual value, as admitted by the claimant, was less than the annual payment made by the claimant to the society, and that there was no freehold worth 40*s.* per annum.

The revising-barrister was of opinion, that, upon these facts, the claimant was progressing towards the acquisition of his freehold, which when fully paid up would have cost him 73*l.*, of which he had paid 71*l.* before January 31st, 1863; and, this having been completed by the payment of the remaining 2*l.* in July last, he found that Derby had a freehold prior to the 31st of January last of the value of 40*s.* per annum, and therefore he retained his name on the list of voters.

If the revising-barrister was right in thus finding the value according to the above facts, the claimant's name was to be retained: if he was not right, the claimant's name was to be expunged.

Markham, for the appellant.—To entitle the party to a vote for the county, he must by the 8 H. 6, c. 7, *possess "free land to the value of 40*s.* by the year at least above all charges." The question is, had Derby on the 31st of January last (a) a freehold of the yearly value of 40*s.* above all charges? It is submitted that he had not. The purchase-money for the property, 73*l.*, was advanced to him on mortgage, subject to certain monthly payments amounting in the whole to 4*l.* a year. The annual value of the land for building purposes was 3*l.* Before the 31st of January last, the payments made on account of principal and interest of the mortgage-money amounted to 71*l.* A further payment of 2*l.* was made in July. Until that payment was made, the claimant had not a freehold which was worth to him 40*s.* a year free of charges, and therefore was not in a position to be upon the register. In *Copland, app., Bartlett, resp.*, 6 C. B. 18 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 183, it was held that a mortgagor in possession is not, under the 6 & 7 Vict. c. 18, s. 74, entitled to be registered as a voter, unless his estate therein is of the value of 40*s.* per annum beyond the interest payable upon the mortgage. And in *Lee, app., Hutchinson, resp.*, 8 C. B. 16 (E. C. L. R. vol. 65), 2 Lutw. Reg. Cas. 159, A., possessed of a freehold estate of the yearly value of 5*l.*, mortgaged it for 100*l.*: the deed was declared to be a security for the principal sum only; and the power of sale was for payment of that sum only at a day long past: but it was found as a fact that interest had been regularly paid upon the 100*l.* at 5 per cent.: and it was held that A. had not an interest in land "to the value of 40*s.* by

the year at the least above all charges," within the 8 H. 6, c. 7, and therefore was not entitled to be registered for the county. The same principle was applied in *Beamish, app., Stoke, resp.*, 11 C. B. 39 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 189, to the case of an allottee of shares in a building society, whose weekly contributions reduced *481] the value of his interest in the land below 40s. a year. It is not enough that the party is "progressing towards" the acquisition of a freehold: he must actually have been in the enjoyment of it for six months prior to the 31st day of July. [ERLE, C. J.—He has paid all the interest and all the principal before the 31st of January, except 2l. BYLES, J.—The difference between the case of Copland, app., Bartlett, resp., and this case, seems to be this,—the barrister there did not find what the value of the voter's interest was; but here the value before the last payment was made is found to be 71l.]

No one was instructed to appear on behalf of the respondent.

ERLE, C. J.—I am of opinion that the decision of the revising-barrister in this case was right. The difficulty has arisen from the case of Copland, app., Bartlett, resp., which left the law in some doubt. But I think the revising-barrister has stated this case with remarkable precision and learning, rightly concluding that the mortgagor in possession was upon the facts proved before him qualified to vote. Both in that case and the present the party was bound to pay certain monthly instalments, and in each the aggregate of those instalments exceeded the annual value of the property,—the monthly instalments in Copland, app., Bartlett, resp., being 15s., or 9l. per annum, and the yearly value of the property being 8l. only,—and here the monthly instalments being 6s. 8d., or 4l. per annum, and the yearly value of the land 3l. only. We must look at the substance of the transaction and the nature of the charge to be paid. The party was to pay for his land 73l. When he had paid that sum, he would be the undoubted owner of a freehold of the yearly *482] value of 3l. At the time the revising-barrister had to ascertain the value of his interest, he had paid 71l., no default having been made in any of his monthly payments: and the whole 73l. had been paid when the parties were before the court of revision. The question is, what was the value of this man's estate on the 31st of January. Looking at all the statutes, which are well collected in Copland, app., Bartlett, resp., the substance of the transaction is that he had at that time a freehold exceeding the yearly value of 40s., but subject to a payment on account of principal and interest of 2l. The judges who decided the case of Copland, app., Bartlett, resp., persons of great estimation and learning, certainly have brought much difficulty on the revising-barrister, who could not come to a correct conclusion in this case without a very close investigation of the grounds of that decision. It is to be gathered from the statement of that case, that the mortgagor, in order to become the owner in fee-simple of a cottage and garden worth 8l. a year, was to pay the amount of the purchase-money (65l.) by monthly instalments of 15s. My Brother Byles, who appeared for the appellant, was asked by the court in the course of the argument, what was the real value of the claimant's interest, as the case did not distinctly state it: and Maule, J., in his judgment

observes,(a)—“It is said that the amount of the appellant's interest as mortgagee is not stated in the case; and, if this were material, the case might be sent back to be re-stated: but my Brother Byles, knowing how matters stand, prudently declines such a reference to the revising-barrister. I think, therefore, that the payment of 9*l.* a year by the claimant in respect of the mortgage must be deducted from the annual value of his freehold, and consequently the decision of the *revising-barrister was right.” He seems to say, therefore, [*483 that, if the revising-barrister had found that the mortgagor had at the time an interest of the value of 40*l.* a year, he would have been held to be qualified; but because the learned counsel declined to have that fact ascertained, it was to be assumed that the party had not such an interest, and consequently was disqualified. Here, however, the revising-barrister has found that Derby had a freehold prior to the 31st of January of the value of 40*s.* per annum; and he has stated the facts which led him, and I think rightly, to that conclusion,—facts which were wanting in the former case. For these reasons I am of opinion that the decision should be affirmed.

WILLIAMS, J.—I am of the same opinion. I entirely adopt the view which the revising-barrister has taken. When the case of Copland, app., Bartlett, resp., is minutely examined, it will be found that the point involved here was not raised there. It was contended on behalf of the claimant there that the 6 & 7 Vict. c. 18, s. 74, which gives the right of voting to the mortgagor in possession, gives it him irrespective of what his interest in the property may be when the amount of the encumbrance is taken into consideration: and the court decided two points,—first, that a mortgage is a “charge” within the meaning of the statute 8 H. 6, c. 7, and therefore that the enactment giving the mortgagor in possession a right to vote must be considered as giving him that right only where he has 40*s.* a year clear beyond that charge,—secondly, that the encumbrance in question, viz. the monthly payments secured by mortgage to the trustees of a benefit building society under the 6 & 7 W. 4, c. 32, was a charge within the meaning of that rule. In the course of the argument, it was suggested, that, for anything that *appeared, the interest of the party was [*484 of the value of 40*s.* a year beyond the charge. The case being somewhat imperfectly stated in that respect, it was put to the learned counsel for the appellant whether it would not be better to send the case back to the revising-barrister for amendment. He, however, with his characteristic prudence, declined to have it amended. It was plain, therefore, that the interest of the party was not of the value of 40*s.* a year after deducting the encumbrance. Here, the value is found to be sufficient to confer the franchise.

BYLES, J.—I am entirely of the same opinion; and, had it not been for the case of Copland, app., Bartlett, resp., I should have entertained no doubt whatever. What are the facts? Derby has a beneficial equitable interest in an estate of the value of 73*l.*, to the extent of 71*l.*; and that 71*l.* is found to be of the annual value of 40*s.* above all charges. That clearly gives him a right to vote within the 2 W. 4, c. 45, and 6 & 7 Vict. c. 18. The distinction which has already been pointed out between Copland, app., Bartlett, resp., and the present

S. 412 (E. C. L. R. vol. 91), K. & G. 182, pursuant to the trusts of two wills, certain lands in Northamptonshire were purchased in 1776, and vested in trustees upon trust to apply the rents and profits, amongst other charitable purposes, to and amongst certain persons described as "the six beadsmen of Daventry," as to whose origin there was no evidence. The persons thus described had received 50s. a year each for the last twenty years; but they had all been appointed since the passing of the Reform Act, by resolution of the bailiffs and burgesses of Daventry, in whom the appointment had from very early times been vested, and who were also trustees under the above-mentioned wills. And it was held that the parties so appointed had not an estate which came to them by promotion to an "office," within the meaning of the 2 W. 4, c. 45, s. 18, but were mere recipients of charity, and as such disqualified by reason of s. 36. So, in *Heath, app., Haynes, resp.*, 3 C. B. N. S. 389 (E. C. L. R. vol. 91), K. & G. 199, the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10*l.*, of which he had the exclusive use: the appointment was for life, subject to removal for breach of any of the rules; and the inmates were rated in respect of their several occupations: and they were held not entitled to be registered. *Heartley, app., Banks, resp.*, 5 C. B. N. S. 40 (E. C. L. R. vol. 94), K. & G. 219, is an extremely strong case. There, the military or poor knights of Windsor were held not to have such an "office," or such an interest in the houses occupied by them, as to entitle them to be registered for the borough, under the 2 W. 4, c. 45, s. 27. In *489] delivering the judgment of the court, Cockburn, C. J., "there says: "We must not suffer ourselves to be led away by names, however dignified or high-sounding. Although the persons deriving benefit from this royal and noble foundation are dignified by the honourable title of military knights, there is nothing whatever of knightly service connected with the institution, which is one of a purely eleemosynary character. It purports to be so by the very terms of the appointment of the object of the royal bounty: and the whole scope and object of the institution, as well as the terms and conditions on which the advantages of the royal bounty are to be enjoyed, all clearly establish the same thing. It is plain that the charitable support of men who have fallen into poverty and decay in the military service of the realm, was the primary and main purpose of the institution, and that, for that purpose, the pecuniary and other advantages incidental to the appointment were annexed to it; while, with a view to its half collegiate and half monastic character, peculiar obligations and observances were imposed. Looking to the substance of the thing, not to the name by which it has been dignified, it is plain that it is a *charity*,—a royal and noble charity, it is true,—but still a *charity and nothing more.*" Again, in *Freeman, app., Gainsford, resp.*, 11 C. B. N. S. 68 (E. C. L. R. vol. 103), K. & G. 448, a hospital was founded at Sheffield, under the will of Gilbert, Earl of Shrewsbury, for twenty "poor persons who should give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity." The persons eligible as members or inmates were to be "poor indigent people, well esteemed of for godly

life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute should be judged fit objects of the charity." Each poor person on his or her election was placed in rooms *with certain allowances. They were prohibited from letting or assigning, or permitting any person [490 to occupy the rooms jointly with them; and they were to be removable by the governing body if found guilty of certain irregularities. It was held,—upon the authority of *Heartley, app., Banks, resp.*,—that the inmates had no such estate or interest in the rooms occupied by them as to entitle them to be registered as voters for the county. In giving judgment, *Erle, C. J.*, says: "It appears from the statements in the case, that *Shrewsbury Hospital* was founded under the will of *Gilbert Earl of Shrewsbury*: and, by the constitutions which are before us, it appears that the persons to be elected members or inmates thereof are to be 'poor persons who shall give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity.' They are to be 'poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute shall be judged fit objects of this charity.' All the other regulations or constitutions are entirely consistent with that. It appears that in practice each of these poor persons upon his election is placed in a set of chambers, and probably continues therein from the time of his election until he dies: but the question is, not as to the time of occupation, but what are his rights when placed there. It seems to me that he is elected as a mere object of charity; and that, when the governor assigns him rooms for his residence, he does not confer upon him any estate which he could enforce by bill in equity." Here, the parties objected to were duly qualified as freemen of the borough; and the question is, whether they are not disqualified as almsmen. The 36th section of the Reform Act disqualifies all persons who *shall within twelve months of the last day of July "have [491 received parochial relief or other alms which by the law of parliament now disqualify from voting." [*BYLES, J.*—The case finds that these hospitals are each "by repute a corporation by prescription." Are these persons members of the corporation?] If they were they would have no vote as such. In *Elliott on Registration*, 2d edit. 250, it is said: "As the law existed before the passing of the Reform Act in many boroughs, particularly in those in which the franchise was in the nature of a personal right, the receipt of alms was held to be a personal disqualification. Mr. Rogers observes,—*Rogers on Elections*, 7th edit., p. 99,—'Persons who are, or who have been within a certain time, obliged to depend wholly or in part on eleemosynary assistance, have been held by *Whitelocke* and other writers to be disqualified by the common law, not only because from their indigence they were unable to contribute to the wages of their members, but because from their dependent situation their voices were no longer free.'" Again, at p. 257, Mr. Elliott says: "What 'other alms' will 'by the law of parliament now disqualify,' will, in many of the old boroughs, be explained by the determinations of committees and the custom of the place. The following cases have been decided by committees with respect to particular charities:—In the

Taunton Case, 1 Doug. E. C. 370, it was resolved that 'alms' means parochial collection, or parish relief, and that 'charity' signifies sums arising from the revenue of certain specific funds which had been established or bequeathed for the purpose of assisting the poor." That is the case here. "In the Aylesbury Case, 12 Journ. 487, one John Bedford devised lands to be dealt in alms to blind people, crooked, sick, and lame people. This charity is distributed annually *492] by the feoffees to the poor of *Aylesbury, in small sums of 2s., 3s., 4s., or 5s. each, and is commonly continued to the same persons for their lives; but it is in the discretion of the feoffees to change them if they think fit. The House resolved 'that all persons receiving this *alms* within the borough of Aylesbury, pursuant to the will of Mr. Bedford, or any other persons receiving any *other charity* annually distributed within the same town, are in respect thereof disabled to vote in the election of burgesses to serve in parliament for the said borough." It is extremely difficult to distinguish that case from the present. The objects of this charity are to be selected from among the poor, lame, and impotent inhabitants of the town, having no competent means to live. [BYLES, J.—In the Aylesbury Case, the trustees or feoffees were to divide the fund as *alms eo nomine*. Here, the participators in the revenue are members of the corporation.] In the Reading Case, 2 Doug. E. C. 105, it was resolved that persons receiving Kendrick's Charity, or any other annual charity distributed in the borough of Reading, were disqualified. Greenwich and Chelsea pensioners are not disqualified, because their pensions are rewards for past services. Mr. Elliott, no doubt, refers to cases which bear a somewhat different aspect; but they are all more or less explainable upon various grounds.

Welsby, contrâ.—It is not proposed to dispute any of the cases decided in this court since the Reform Act. But, it being conceded that these persons are qualified under s. 32 of that act as freemen, the question is whether they are disqualified by the operation of s. 36. What the law of parliament upon the subject of alms was at the time of the passing of the Reform Act, is to be gathered from the decisions of election committees, which doubtless are somewhat conflicting. *493] *These foundations are reputed corporations by prescription. The brethren constitute the corporation. But for that, it might have been contended here that they had a freehold (equitable) interest, or that they occupied as owners within s. 27. The case states that these two hospitals are under the government of the charity-trustees appointed by the Chancellor; that the property of the same consists in landed estates and houses; that the income arising from the former is divisible annually among the brethren in equal proportions, and a house assigned to each of the brethren wherein to live; that each house is kept in repair by the brother who lives in it (not an immaterial circumstance); and that the right of appointment of brethren is vested in the charity-trustees. [WILLIAMS, J.—The very point was raised on these foundations in 1690, in the Sandwich Case, 10 Journ. 457, of which Serjt. Heywood says,—County Elections 265,—“The right of election was agreed to be in the freemen of this port inhabiting within this port. Mr. Serjt. Thurbane having 225 votes, his election was not disputed. Mr. Brent had 124, and Mr. Mitchell

114. The two former were returned, and Mr. Mitchell petitioned. He insisted that four of those who voted for Mr. Brent were made free after the teste of the writ, that another was not an inhabitant within the port, and that five were servants. By this means the petitioner would have had an equal number of votes with Mr. Brent: but three of those objected to as made free after teste of the writ were entitled to their freedom by birth; and at all events it was necessary to disqualify more, to obtain a majority in his favour, and be seated. He therefore objected to more than thirty as almsmen, or receiving charitable donative. But, it appearing to the committee that 'freemen in general had always voted at elections of parliament men for the said port,' the *committee came to two general resolutions. [*494 The first resolution was, 'that it is the opinion of this committee that the freemen of the port of Sandwich, inhabiting within the said port, *although they receive alms*, have a right to vote in electing barons to serve in parliament.' The second, 'that Edward Brent, Esq., was duly elected.' The first resolution being reported, the question was put, that the House do agree with the committee: it passed in the negative: and yet, what is singular enough, the House agreed in the second resolution by a majority of *one* (the numbers being 175 to 174) that Edward Brent, Esq., was duly elected."] The case finds that these brethren have always heretofore voted without objection. Many cases are referred to both in Elliott and in Rogers which establish this distinction between "parochial relief" and "other alms," viz. that, "with regard to charitable foundations and endowments, those only disqualify whose funds have formed a part of the parish resources for the relief of the poor,^(a) and have been managed by the overseer or other officer whose duty it is to provide for and pay the paupers, and have been conducted by his agency into the same channels and applied to the same purposes to which they would have been applied if they had been the produce of the ordinary parish rates:" Rogers 104. "The difference," says Mr. Elliott, p. 258, "between alms and charity was discussed in the case of the Harpur charity, which arose from estates granted by Sir William Harpur to the corporation of Bedford for certain charitable objects, the surplusage of the rents and profits to be distributed *in alms* to the poor of the said town, for the relief of poor decayed housekeepers, and other proper objects. It appeared that this charity had been generally distributed to the middling sort of people, and to many *who paid parish taxes; that it had always been considered as a sort of donation, [*495 and distinguished from the parish pay. The committee resolved, 'that persons receiving Sir W. Harpur's charity are not thereby disqualified within the meaning of the determination of the 12th April, 1690:'" see the Bedford Case, 2 Dougl. E. C. 122, 123. Mr. Rogers (p. 105) instances the cases of Hawes's Charity and St. John's Hospital, where the votes were held good. In the former, "the money was expended in bread, given away chiefly to wives and children: it was argued that it would be unjust to deprive a man of his franchise because his wife or his child had, perhaps unknown to him, received some bread from this charity." In the latter, "the brethren, as they were called, were parties to all leases made of their land: they each

(a) *The King v. The Inhabitants of Halesworth*, 3 B. & Ad. 717 (E. C. L. R. vol. 23).

received 9d. per week from the revenues of their land." He also mentions Welborn's Charity,—“Robert Welborn left a close to the ministers and *overseers* of the poor of St. John's parish, in Bedford, to be distributed to the poor on New Year's Day. The practice appeared to be to distribute it in sums of three or four shillings to each person: and the votes were held bad. In the Sudbury Case, Phillips 149, Martin Cole left an annuity to trustees to buy materials for shirts and shifts to be made up and delivered to the ministers, churchwardens, and overseers of the poor, to be by them given to twenty-five poor men and twenty-five poor women of Sudbury. Nathaniel King left an annuity in like manner to purchase 100 loaves, one to be given to each person who had received a shirt or shift under Cole's bequest. In Sudbury, *the overseers have nothing to do with parish pay, the paupers there being under the government of a workhouse corporation established by law antecedent to the act of Elizabeth.* The usage was in favour of the vote being received. In the Downton Case, 1 Luders *496] *493, William Stockman gave lands to feoffees, to distribute the rents among such poor craftsmen and labourers as should be surcharged by children, as should seem best to the feoffees, and “not to go or be employed to the increase of the church box of the said parish.” By the fourth item, it was directed that this provision should not be accounted any abatement of the collection for the church box, or *any other relief of the poor usually provided for the poor of the parish.* The trustees who managed the charity gave it to those who received parish relief, but to those only in need of temporary assistance. In the Gloucestershire Case, Orme 121, W. V., within twelve months before the election, received part of a sum given by will to the poor of the parish of Thornbury “who are not on the parish books, and receive no monthly pay.” None of the four last-mentioned charities was held to disqualify. So, in the Colchester Case, 1 Peck 508, Joseph Cox appointed the sum of 100*l.* to be laid out in freehold land, and had given the yearly profits thereof to the poor of the parish, to be distributed, at the discretion of the parish officers, on Christmas Day annually. The parish officers accordingly did distribute the same in sums from 1*s.* 6*d.* to 5*s.* respectively, according to the size of the families of the applicants. The votes were held good. These several authorities clearly show that these persons are not recipients of alms within the 36th section of the Reform Act.

Hayes, Serjt., in reply.—The same reason which prevents these persons from acquiring an estate, disqualifies them as recipients of alms. [KEATING, J.—What do you say to the Colchester Case, 1 Peck 508? “Isaac Hazell had met with an accident, and, upon the application of a principal inhabitant, was attended by the *497] apothecary for the poor of the parish gratis: and his *vote was held good.”] Other decisions in the same case are inconsistent with that, unless it be distinguishable on the ground that the attendance was not at the party's own request. “Jeremiah Hearsom was attended while sick by the parish apothecary, by order of the parish officers, *upon the request of the voter.*” Again, “the wife of Thomas Iron was attended during her confinement by the parish apothecary, *at the request of the voter,* and by order of the parish officers:” and in both these cases the votes were held bad: Rogers 252. [BYLES,

J.—Mr. Rogers, p. 257, cites the Coventry Case, 1708, 16 Journ. 129. "The right of election was held to be in persons who have served apprenticeship for seven years within the city to one and the same trade, not receiving alms or *constant charity*. The petitioners ought to disqualify those voters who had received Sir Thomas White's gift (which is a gift of 40s. annually to each of the objects of his charity); and, the question being put in the House, that they were disabled by receiving it, it passed in the negative." It would be a strong thing to call that alms.

ERLE, C. J.—I am of opinion that the decision of the revising-barrister in this case was right, and that the votes in question are good. The parties claiming the franchise are freemen of the borough, and as such entitled to be registered, unless disqualified by the 36th section of the Reform Act, which enacts that no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future parliament for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which by the law of parliament now disqualify from voting in the election of "members to serve in parliament." I cannot find that the recipients of the proceeds of these lands [*498] were disqualified by the law of parliament at the time the Reform Bill passed. In the Sandwich Case referred to by my Brother Williams, the House negatived the qualification, and yet decided that the member for whom the almsmen voted should keep his seat. That leaves the matter doubtful: and we should always incline to favour the qualification, unless the law compels us to decide against it. If we are to resort to conjecture as to the meaning of the legislature,—which evidently was that persons so placed by their indigence as to be presumably subservient and destitute of all freedom of mind, should not be permitted to exercise the franchise,—I must own I should think that these freemen, by reason of their having a house, and a share in the profits of the land belonging to the hospital, for life, are gifted with a far greater probability of independence than those who have nothing to rely on but the precarious proceeds of their own labour. The recipients of these funds may at the time of their admission have a prospect of many years of active and profitable labour before them: and I see nothing to justify me in holding that the advantages they enjoy operate any disqualification on the score of alms.

WILLIAMS, J.—I am entirely of the same opinion. I think it is not made out that the circumstances under which these freemen participate in the revenues of these hospitals show them to be in the receipt of disqualifying alms within the meaning of the statute. There certainly does seem to be a great conflict of decisions so far as the committees of the House of Commons are concerned. I find it laid down in Heywood on County Elections,—a book of very high authority,—p. 278, that "a distinction may be made between [*499] charities which are of such a nature as to imply that the par-taker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn." It seems to me to be quite out of the question to hold that these parties are in such a state of indigence and abject

dependence as that they ought to be disqualified from being on the register.

BYLES, J.—I am of the same opinion. I collect from the statements in the case, that these hospitals are corporations by prescription, and that the occupants of the houses and participators in the revenues are members of the respective corporations. The case also finds that the property of the hospital consists in landed estates and houses; the income arising from the former being divisible annually among the brethren in equal proportions, and a house being assigned to each of the brethren wherein to live, each house being kept in repair by the brother who lives in it. These persons, therefore, are each residing on his own property, and entitled by law to continue to reside there for life, and receive his share of the revenues of the corporation. Independently, therefore, of the decisions, I should have thought these parties not disqualified. But, comparing the cases cited on the part of the appellant with the Bedford Case, the Coventry Case, and the cases of the Greenwich and Chelsea pensioners, the result would seem to be that the brethren of these foundations cannot be said to be in the receipt of *alms* when what they receive, whatever be its amount, is received as a matter of right. Upon that view of the cases, these parties are not disqualified. The Sandwich Case, referred to by my Brother Williams, is a singular one. The voters there were members of these very corporations: and the result leaves the right in some *500] ^{*doubt.} Upon the whole, therefore, I think the decision of the revising-barrister was right.

KEATING, J.—I am of the same opinion. These brethren, as free-men of the borough, were *primâ facie* entitled to vote. The question is, whether they are disqualified by the receipt of *alms*. The parish officers have never interfered in the distribution of the funds of these corporations. Each of the brethren is entitled to a share of the revenues of the land and to a house to live in: and the usage is in favour of their qualification. For these and the reasons given by the other members of the court, I am of opinion that the objection is not well founded.

Decision affirmed, with costs.

City of LONDON.

PETER HENRETTE, Appellant; THOMAS WOODZELL BOOTH, Respondent. Nov. 21.

The occupation of "part of a house" may confer a right to vote for a city or borough, under the 2 W. 4, c. 45, s. 27, if there be independent occupation and *actual severance* from the rest.

A. occupied the upper floor of a house, consisting of two rooms, an inner and an outer room, opening the one into the other, and communicating with the landing on the staircase by one outer door, over which A. had exclusive control. The floors below were occupied by other tenants, and all had access to their several holdings from the street through a doorway at the entrance of a passage leading to the common staircase. At this entrance was a door open all day, but generally, but not invariably, allowed to swing to at night, but having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street:—Held, that the subject of occupation was a "house" within the meaning of the 27th section of the Reform Act.

AT a court held for the revision of the lists of voters for the city

of London, Thomas Woodzell Booth, on the list of voters of the livery of the company of distillers, duly objected to the name of Peter Henrette *being retained on the list of persons entitled to vote in the election of members for the city of London, in the parish of St. Giles-without-Cripplegate, under the following circumstances:—

It was contended by the objector, and proved before the revising-barrister, that the qualification of Peter Henrette (hereinafter termed the appellant) fulfilled all the conditions precedent to registration required by the Reform and Registration acts, with the exceptions, if such the court shall adjudge them to be, hereunder detailed.

The appellant occupied for the statutory period, as tenant, the whole of the upper floor, consisting of two rooms, of a tenement in No. 4, Honeysuckle Square. He uses one room as a tailor's shop, and the other as a sitting and bed-room. His only residence is in the premises, which, taken together, are of the requisite value to confer a qualification; but neither of the rooms taken singly is of the requisite value. They consist of an inner and outer room opening the one into the other, and communicating with the landing on the staircase by one outer door, over which the tenant occupier has exclusive control.

The floors below are occupied by other tenants; and all have access to their several holdings from the street through a doorway at the entrance of a passage leading to the common staircase of the building. At the entrance is a door open all day, but generally, although not invariably, allowed to swing to at night, and having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street.

It was under this state of circumstances contended for the appellant, —first, that the subject of occupation was a house,—secondly, that, if not a house, it was a “building” within the meaning of the qualifying *clauses of the Reform Act,—thirdly, that, if not a house or building, the use for commercial or business purposes as a workshop of one of the two rooms not severed in any way from the rest of the premises, constituted the whole subject of occupation a “shop,” within the meaning of the qualifying clauses of the Reform Act.

On the other hand, it was contended by the objector,—first, that the facts did not show such a severance of the qualifying premises from the rest of the tenement of which they formed the upper floor, as to constitute them a house,—secondly, that the one room used as a workshop was not of sufficient value to confer the franchise,—thirdly, that the use of one of the rooms for the purposes of trade, did not impart the character of a “shop” to the whole premises the subject of occupation,—fourthly, that the nature of the occupation did not warrant their designation as a “building” within the meaning of the Reform Act,—fifthly, that the use of one of the rooms for habitation rendered the whole premises a residence insufficient to confer a qualification, because not a “house” within the meaning of the Reform Act.

The revising-barrister sustained the objection, and expunged the name of the appellant from the list of voters, on the ground that the whole premises the subject of occupation did not constitute in law a house or building, or a shop, within the meaning of the Reform Act.

If the court should be of opinion that the decision was erroneous, the name of the appellant Peter Henrette was to be re-inserted in the list of voters in the parish of St. Giles-without-Cripplegate.

Kinglake, Serjt. (with whom was *Underdown*), for the appellant.—
 *503] The question is whether the premises *described in this case constitute a "house" or "building" within the 27th section of the Reform Act. It is not proposed to dispute the well-considered judgment of this court in *Cook*, app., *Humber*, resp., 11 C. B. N. S. 33 (E. C. L. R. vol. 103); but it is submitted that the present case is not within it. In that case the court had to consider the propriety of some former decisions, viz. *Score*, app., *Huggett* resp., 7 M. & G. 95 (E. C. L. R. vol. 49), 8 Scott N. R. 919, 1 Lutw. Reg. Cas. 198, and *Toms*, app., *Lockett*, resp., 5 C. B. 23, 2 Lutw. Reg. Cas. 19, on the one side, and *Pitts*, app., *Smedley*, resp., 7 M. & G. 85, 8 Scott N. R. 907, 1 Lutw. Reg. Cas. 163, and *Wansey*, app., *Perkins*, resp., (*Hill's Case*), 7 M. & G. 151, 8 Scott N. R. 978, 1 Lutw. Reg. Cas. 252, on the other. The result, as it now stands, seems to be, that, if the premises in respect of which the right to be registered is claimed are so severed from the rest of the house that the occupier has complete control, the fact of there being an outer door does not interfere with the franchise. In *Pitts*, app., *Smedley*, resp., there was an outer door which the court considered as the outer door of the entire house, and so there was no severance. In delivering the judgment of the court in *Cook*, app., *Humber*, resp., *Erle*, C. J., says: "In these four cases the subject of occupation was in substance the same, namely, a part of a house let for lodgings: but the occupation itself was made the subject of distinction. In two of them, the lodger was held to be qualified, because his occupation was as tenant: in the other two, the lodger was held not to be qualified, because his occupation was as lodger. In the present case, we rest our judgment, not upon the kind of occupation described in the statement, but upon the *subject* of occupation. We consider that the qualification fails, because the subject of occupation was, not a house, but only a part of a house, *without any actual severance from the residue*." After going into detail through the
 *504] four cases above referred to, his Lordship proceeds,—“Therefore we think that the true question in the cases cited, and in the present case, turns on the nature of the tenement occupied. Is it such property as the legislature intended to make a qualification? Now, the statute required some permanent occupation of, and some independent interest in, the property. The permanence prevents the sudden creation of votes. The ownership or the tenancy, with rating, indicates some independence: in other words, the requirement of at least a tenancy excludes some occupations of less independence; such as the occupations of servants for their service; for example, porters of the lodge, gardeners of the dwelling in the garden; and also such as that of the surgeon for the hospital of the rooms therein (*Dobson*, app., *Jones*, resp., 5 M. & G. 112 (E. C. L. R. vol. 44), 8 Scott N. R. 80, 1 Lutw. Reg. Cas. 105); also the occupation of premises by objects of charity occupying under the permission of the trustees of the charity. —*Davis*, app., *Waddington*, resp., 7 M. & G. 37, 8 Scott N. R. 807, 1 Lutw. Reg. Cas. 159; *Heartley*, app., *Banks*, resp., 5 C. B. N. S. 40 (E. C. L. R. vol. 94), K. & G. 219. These and the other cases of occupation

inferior in right to a tenancy are excluded by the requirement that the occupier must be at least the tenant. But, if he is tenant, he occupies as tenant, and this part of the qualification is complete: and it is immaterial as to this under what denomination of tenant he is classed, whether as lodger, termor or lessee, or other name." In a subsequent part of the judgment, his Lordship says: "In Judson, app., Lockett, resp., 2 C. B. 197 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 490, the claimant occupied the upper part of the house and the kitchen, having a distinct and separate entrance thereto. The landlord occupied the ground-floor, having a distinct and separate entrance thereto. The *claim in the list was for part of a house. The judgment is, that the claimant was qualified, because a part of [*505 a house in one sense may be so completely separated from the residue as to constitute a house in another sense. The description 'part of a house' might be true according to the common understanding of the word 'house,' and yet may denote such a house in another sense as will qualify. In this judgment, the qualification is made to turn on the actual severance." The description of premises here plainly conveys the notion of complete and actual severance. "They consist," says the case, "of an inner and outer room opening the one into the other, and communicating with the landing on the staircase by one outer door, over which the tenant occupier has exclusive control." The access is from the street "through a doorway at the entrance of a passage leading to the common staircase of the building. At the entrance is a door open all day, but generally, though not invariably, allowed to swing to at night, and having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from without." The question is, whether the subject of occupation here is not different in point of severance from the premises in Cook, app., Humber, resp. In Bryan Kearney's Case, Alcock's Reg. Cas. 22, the claimant occupied the ground front apartment of a house as a shop, at a rent of 20*l.*; the entrance to the shop was through the hall of the house; into that hall there were three doors,—the hall-door opening into the street, the shop-door a few feet from the hall-door, and a door opening to the staircase. The landlord did not reside in the house; and the other apartments were let to lodgers. The street or hall-door lay open all day, and was locked at night; and the claimant and one of the lodgers had each a key for it. The [*506 *taxes were paid by the landlord; and the claimant, in common with the lodgers, had the use of the kitchen and of the water coming to the house. It was held,—upon the authority of *all* the judges,—that the claimant was entitled to be registered as a householder. Crompton, J., in giving his reasons for the judgment, says: "It appears to me that we should take, not the street-door, but the shop-door opening into the hall, to be the claimant's *outer-door*; and for these reasons,—had the shop-door in this case opened; not into the hall, but into the street *immediately*, the claimant's right would be conceded. Were the hall into which the shop-door opens an entry or passage at all times open, it can scarcely be disputed that such a hall would be for the inmates of No. 59, Fleet Street, as a street, and that the claimant's case would be like the case of the tenants of chambers in the Inns of Court, where each chamber is held to be a separate

house. Again, were the hall always open to the street, without any street-door, or having a street-door which lay open night and day, I apprehend the shop-door must under such circumstances be deemed the claimant's outer-door: and, is the transaction substantially varied by the street-door, which lies open all day, being at night locked for the protection of the inmates, the claimant himself having the key of that door in his own possession? I apprehend not. There are such street-doors at some of the English chambers, and yet the separate residences are deemed separate houses. For the doctrine applicable to this case, see *Lee v. Gansel*, Cowp. 1, *Hopkins v. Nightingale*, 1 Esp. N. P. C. 98. The claimant's shop in this case opens into a hall, and within a few feet of the street-door; that hall-door lies open the whole day, and is locked only at night. The landlord does not reside in the house. The claimant has a key for the hall-door: there is no *507] person *who can control or abridge his right of exit and of entrance through this hall; and to me, therefore, it appears to be substantially the same thing as if the claimant's shop-door opened at once into the street." The present case is a stronger one even than that; for, here, the door seems to have been altogether abandoned as an outer door.

Overend, Q. C. (with whom was *Fawcett*), for the respondent.—This case is governed by *Cook*, app., *Humber*, resp., 11 C. B. N. S. 33 (E. C. L. R. vol. 103). The appellant is the occupier of "part of a house," without any actual severance from the rest of the structure. That clearly constitutes no qualification. This is not like the case of a common staircase, such as those leading to chambers in the Inns of Court. The circumstance of there being or not being an outer door, or of the tenant having a key, can have nothing to do with the question. [WILLIAMS, J.—It is a matter which is not to be lost sight of.] In *Wilson*, app., *Roberts*, resp., 11 C. B. N. S. 50 (E. C. L. R. vol. 103), the respondent occupied "offices" in the city of London, comprising the whole of the first floor of the house (his residence being within the required distance), and was rated and assessed, and had paid all rates and taxes in respect of the premises. The landlord occupied the shop on the ground-floor of the house, and with his family resided on the upper floor thereof. There were two outer doors to the house,—one opening from the street into the shop, the other into a passage communicating with the staircase leading up to the first and upper floors. The door opening from the street into the passage had only one lock, of which the respondent and the landlord each had a key. It was held that the respondent was not qualified to vote as tenant of a "house" within the 2 W. 4, c. 45, s. 27, the "subject of occupation" *508] being a "part of a house," which part had not become by actual severance an entire house in any sense of the word. It is utterly impossible to distinguish that case from the present. As to *Bryan Kearney's Case*, all that can be said is, that it is in direct conflict with *Cook*, app., *Humber*, resp., and *Wilson*, app., *Roberts*, resp.

Kinglake, Serjt., in reply.—There is no conflict between *Kearney's Case* and *Cook*, app., *Humber*, resp. *Wilson*, app., *Roberts*, resp., is a totally different case: there was no severance there; and the rooms held by *Roberts* could not in any sense be said to be a "house," and it was

not stated to be a "shop," "warehouse," or "counting-house," but "offices" only. If the party had described it as "counting-house," he would probably have been held entitled to be registered: see *Downing, app., Luckett, resp.*, 5 C. B. 40 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 33.

ERLE, C. J.—I am of opinion that the decision of the revising-barrister in this case was wrong, and that the claimant obtained his franchise. I think he was occupier of a "house" within the meaning of the statute and of our decision in *Cook, app., Humber, resp.* He occupied the whole of the upper floor, which communicated with the landing on the staircase by an outer door over which he had the exclusive control. The case finds that there are other floors occupied by other tenants, and a common passage from the staircase to the entrance, with a door, which, if ever closed, was only closed by falling to, without any lock or fastening of any description. In *Cook, app., Humber, resp.*, the court felt great difficulty in coming to any clear and definite determination as what will constitute a separate "house," where the *subject of occupation forms one of several tene- [*509
ments all under one roof. But they felt themselves under the necessity of holding, that, as there might be several houses under one roof, so they might be divided, either vertically by a party-wall, or horizontally by floors, each floor becoming a separate house. If a house has been divided by floors or flats into several distinct tenements, there would be great complication and difficulty in holding that the franchise of the several occupiers might be destroyed by the addition of an outer door. The court, therefore, came to the conclusion that every flat might constitute a separate house, and that the whole might have the additional protection of an outer or street-door without preventing each from being still for this purpose a separate house. That having been laid down in the course of the judgment, and the cases of chambers in the Inns of Court and of flats having been considered, the court endeavoured to point out that the question whether or not the subject of occupation constituted a separate house did not depend upon the presence or absence of the landlord, or the possession by the tenant of a key of the outer door; but they endeavoured as far as possible to point out that there must be an actual severance: and reference was made to *Kitchin on Courts* 99 (5th edit. 92), to the observations of Parke, B., in *Monks v. Dykes*, 4 M. & W. 567, and *Evans and Finch's Case*, Cro. Car. 473, and *The King v. Great and Little Usworth*, 5 Ad. & E. 261 (E. C. L. R. vol. 31), 6 N. & M. 811. *Downing, app., Luckett, resp.*, 5 C. B. 40 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 33, seems to be an authority to the same effect. A more definite description of a "house" I am unable to give. Upon the finding of the revising-barrister here, there seems in this case to have been as complete a severance of the rooms occupied by the appellant as there is in the case of chambers in the Inns of Court, *where there is sometimes the additional circumstance of an [*510
outer door, and sometimes not. The party has exclusive possession of the floor occupied by him, and exclusive control over the outer door of that floor. As to the case of *Wilson, app., Roberts, resp.*, 11 C. B. N. S. 50 (E. C. L. R. vol. 108), there was not the least distinction between the case of the tenant there and that of any other ordinary lodger. The doctrine which we attempted to lay down in

Cook, app., Humber, resp., appears to be sanctioned by the opinion of the twelve judges in Ireland in Bryan Kearney's Case. For these reasons I am of opinion that the appellant gained the franchise here, and that his appeal must be allowed.

WILLIAMS, J.—I am of the same opinion. I feel bound to abide by the doctrine which was laid down after much deliberation in Cook, app., Humber, resp., that the occupation of part of a house may give the franchise, if there be independent occupation and complete severance between such part and the remainder of the house. Regard being had to the several decisions which have taken place upon this subject, it is impossible to deny that it is very difficult to define what is an actual severance. In the case of chambers in the Inns of Court, it is conceded on all hands that there is complete severance. The rights of the occupiers of chambers in the Inns of Court would not, I apprehend, be varied if a gate or an iron railing were placed at the common entrance, in order to protect the staircase against intruders. I do not see how the occupation here differs in any material degree from that of chambers in one of the Inns. By analogy to those cases, it seems to me that there was such a severance here as to entitle the appellant to be registered.

*511] KEATING, J.—The cases certainly run very close, and the distinction between them is necessarily very fine. Looking at the facts found by the revising-barrister, I have come to the conclusion, though not without difficulty, that the appellant was the occupier of a "house" within the meaning of the 27th section of the Reform Act. The only door which the revising-barrister speaks of as an outer door, is, the door leading from the rooms in the appellant's occupation, and over which he had exclusive control. Practically, there was no other outer door. There is, it is true, at the bottom of the staircase, a thing which is in some sense a door, but which wants all the essential elements of an outer door,—“having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street.” It is as though the outer door were taken off its hinges and left lying at the side of the door-posts. I think the revising-barrister very properly abstained from calling that the “outer-door.” Upon these facts, I am of opinion that there is such a complete actual severance of the part occupied by the appellant from the rest of the premises as to constitute a “house,” within the rule laid down by this court in Cook, app., Humber, resp., and the requirements of the 27th section of the Reform Act.

Decision reversed.

*Borough of ASHBURTON.

[*512]

GEORGE CAUNTER, Appellant; JOSEPH ADDAMS, Respondent. Nov. 21

One Y. was on the 21st of April, 1859, duly elected by the vestry assistant-overseer of the parish of A. (which is co-extensive with the borough), at a salary of 18*l.* 5*s.* per annum, and his election was duly confirmed by an appointment of justices on the 30th of August. In March, 1861, Y. gave notice to the *guardians* of his "intention to resign," but he subsequently withdrew it; and on the 25th of that month it was resolved at a vestry meeting that his salary should be increased to 30*l.* There was no confirmation of this increase of salary by the justices, or any new appointment of Y. by them. He, however, continued as before to perform all the duties of the office of assistant overseer:—

Held, that service upon Y. of a notice of claim under the 30th section of the Reform Act was a good service.

AT a court held to revise the list of voters for the borough of Ashburton, George Caunter objected to the name of Joseph Addams being retained in the list of persons entitled to vote in the election of a member for the said borough.

The borough of Ashburton is co-extensive with the parish. There are two churchwardens and four overseers.

At a vestry meeting of the parish of Ashburton held on the 21st of April, 1859, Stephen Yolland was nominated and elected to be an assistant-overseer of the said parish under the provisions of the 59 G. 3, c. 12, by a resolution which was in the following words,—

"That Mr. Stephen Yolland be appointed the assistant-overseer, at a salary of 15*l.* per year, and at a further salary of 3*l.* 5*s.* for the making and collecting of way-rates: and that his office be to transact all the duties of an overseer, and to perform all journeys within eight miles without charge, being paid for the extra distance beyond eight miles a fair mileage; and that the sureties he had proposed be accepted, viz. Henry Tozer, Esq., and Mr. Charles Yolland."

On the 30th of August, 1859, the election of Stephen Yolland was confirmed by a warrant of appointment by the justices in petty sessions, of which the following is a copy,—

"Devon, to wit. Whereas, the inhabitants of the *parish of Ashburton, in the county of Devon, in vestry assembled in the said parish on the 21st day of April, 1859, did nominate and elect Stephen Yolland, of the said parish of Ashburton, in the county of Devon, a discreet person, to be assistant-overseer of the poor of the said parish, and did determine that the duties to be by him executed and performed should be all such duties as appertain to and are incident to the office of an overseer of the poor, and did fix the yearly sum of 15*l.* as and for the yearly salary of the said Stephen Yolland for the execution of the said office: Now, we, the undersigned, being two of Her Majesty's justices of the peace in and for the said county of Devon, in pursuance of the statute in such case made and provided, do hereby appoint the said Stephen Yolland to be assistant-overseer of the poor of the said parish of Ashburton: And we do hereby authorize and empower him to execute and perform such duties and to receive such salary as aforesaid fixed by the said inhabitants in vestry. Given under our hands and seals this 30th day of August, 1859, at Newton Abbot, in the county of Devon."

(Signed and sealed by two justices.)

Subsequent to this election by the parish vestry, and before his appointment by the justices, the said Stephen Yolland gave the usual bond to the guardians of the Newton Abbot union (of which union the parish of Ashburton forms part) for the due performance of his duties.

Some time before the 25th of March, 1861, Stephen Yolland gave notice to the board of guardians of the said union of his intention to resign the office, but he did not give notice to any one else. Prior, however, to Lady Day, he withdrew this notice, by letter addressed to the board of guardians. Yolland's nomination and election were not by the board of guardians, but by the inhabitants in vestry.

*514] *On the 25th of March, 1861, a vestry meeting was held at Ashburton, pursuant to notice, "to take into consideration the necessity of advancing the assistant-overseer's salary;" and at that meeting the following resolution was passed,—

"It having been proposed by Mr. Whiteway, and seconded by Mr. Priddis, that the salary of the assistant-overseer be increased to 25*l.*, and that 5*l.* be paid him in addition for the making and collecting way-rates, in lieu of 3*l.* 5*s.*, and an amendment having been moved by Mr. W. K. Batten, and seconded by Mr. Mortimore, that the salary be not increased,—it was carried by a majority, and resolved, that the salary should be increased according to such proposition.

(Signed) "R. G. ABRAHAM, Chairman."

From that time to the present, Mr. Yolland has continued to perform all the duties of assistant-overseer, and has received the increased salary of 25*l.* per annum, but has never applied for or received any fresh warrant of appointment of justices.

On the 15th of November, 1862, the said Joseph Addams and other the under-mentioned voters served a claim on Stephen Yolland to be put upon the then existing rate, which was the first rate for the electoral year, at which time all arrears of rates in respect of the property on which they claimed to vote were paid to him as such assistant-overseer. They were not put upon that rate, but were put upon all subsequent rates, which rates, as well as the existing rate, were duly made and allowed by the justices, and also signed by Stephen Yolland as assistant-overseer. Stephen Yolland made out, and in conjunction with the churchwardens and overseers signed the list of voters for the borough of Ashburton for the present year.

At the revision of the said borough, the name of the said Joseph Addams was objected to as not being *qualified, upon the *515] ground that he was not duly rated, and that the claim to Stephen Yolland was of no effect, inasmuch as his appointment was revoked by the vestry of 1861.

The revising-barrister held that the claim to be rated to Stephen Yolland was a valid claim, and overruled the objection; whereupon the said Joseph Addams duly proved his qualification, and his vote was allowed.

This decision governed the cases of twenty-two other claimants, which were consolidated with the principal case.

If the court should be of opinion that the service of the claim on Stephen Yolland was not a due service of a claim to be rated, within the 30th section of the Reform Act, the names of Joseph Addams

and the before-mentioned twenty-two other persons were to be expunged from the register of voters for the borough of Ashburton.

Karslake, Q. C., for the appellant.—The question is whether service of a notice of claim upon an assistant-overseer who has not been duly appointed can enure as a good service. No doubt, service of notice on an assistant-overseer will satisfy the requirements of the 30th section of the Reform Act,—Points, app., Attwood, resp., 6 C. B. 38 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 117: but, if the claimant chooses to serve the assistant-overseer, it is his business to see that he is duly appointed and qualified to act as such. The 59 G. 3, c. 12, s. 7, requires the appointment of the assistant-overseer to be by warrant of two justices: see Burn's Justice, *Poor*, 29th edit. p. 36. Yolland, having been duly appointed assistant-overseer for the parish of Ashburton in 1859, resigned the office (though in a manner not strictly formal) in 1861, and was re-elected by the vestry at a *different amount of salary. The re-election, to make it valid, required the sanction of a new warrant of appointment by the justices: see *Bamford v. Iles*, 3 Exch. 380. There, a bond, reciting that A. was appointed assistant-overseer of the parish of M., was conditioned for the due performance of his duties "thenceforth from time to time and at all times so long as he should continue in such office." On the 25th of June, 1840, a vestry meeting was held, at which A. was elected assistant-overseer until the 25th of March, 1841, at a salary of 8*d.* in the pound on some sums collected, and 4*d.* on others. Two justices, by their warrant, dated 9th July, 1840, reciting the vestry resolution, and that his salary had been fixed for the execution of his office until the 25th of March then next, stated, that, in pursuance of the 59 G. 3, c. 12, they appointed him assistant-overseer. On the 25th of March, 1841, he was again elected to the same office, at a salary of 50*l.* per annum, and was re-appointed by the justices, and he continued to be so re-elected and re-appointed by the justices until March, 1846. On ceasing to hold office, he retained moneys in his hands: and it was held that the sureties were not liable on the bond. The justices by the statute clearly had a right of supervision over the act of the vestry in increasing Yolland's salary: in this they act judicially. Yolland not having been duly appointed, a notice to him operated nothing.^(a) [*516]

Coleridge, Q. C. (with whom was *Bullar*), for the respondent, was not called upon.

*ERLE, C. J.—I am of opinion that the decision of the revising-barrister in this case was right. The question is whether a notice of claim served upon Yolland, who is found performing all the duties usually performed by an assistant-overseer, was well served. He had in 1859 a valid appointment at a salary of 18*l.* 5*s.* per annum. In 1861, he gave notice, not to the persons in whom is by law vested the election or nomination of the assistant-overseer, but to the guardians of the union, of his intention to resign his office: but, before the time at which his notice could be acted upon, he withdrew it; and, [*517]

(a) The interpretation clause (s. 101) of the 6 & 7 Vict. c. 18, provides that "the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatever manner they may be appointed," &c.

on the 25th of March in that year, the vestry passed a resolution increasing his salary to 30*l.* per annum. I think Yolland continued well in the office of assistant-overseer. It is urged that the alteration of his salary constituted a re-election, which would be void unless submitted for the approval of the justices. It is possible that such want of confirmation might disable him from recovering the increased salary, but it cannot have the effect of invalidating his original appointment. I therefore think the notices of claim in this case were properly served upon him.

WILLIAMS, J., and KEATING, J., concurring.(a)

Decision affirmed, with costs.

(a) Byles, J., was absent.

*518]

*LANCASHIRE.—Southern Division.

JAMES BENNETT, Appellant; THOMAS GOAD BLAIN, Respondent. Nov. 21.

The members of a joint-stock company registered provisionally under the 7 & 8 Vict. c. 110, s. 38, who by the terms of the deed of settlement have only a right to a share of profits,—the real estate of the company being vested in trustees, and the management in a committee,—have no such equitable interest in land as to entitle them to be registered.

At a court held at Manchester for the revision of the lists of voters for the southern division of the county of Lancaster, the name of James Bennett was objected to as not being entitled to be retained or inserted in the Manchester list of voters for the southern division of the county of Lancaster.

The said James Bennett is entitled to one share in the Manchester Corn Exchange, in Hanging Ditch, in Manchester aforesaid, from which he receives more than 40*s.* per annum.

The company of proprietors of the Manchester Corn Exchange was established by deed of settlement, dated the 20th of January, 1837.(a)

(a) The material provisions of the deed of settlement, which was made between nine persons of the first part, and "the several other persons whose names were subscribed, &c., to those presents," of the second part, are as follows:—

Clause 1,—*Objects of the company.* "The parties hereto, and the persons who shall hereafter become proprietors, shall, whilst respectively holding shares in the capital of the company hereby established, be and remain a company, under the name of 'The Company of Proprietors of the Manchester Corn Exchange,' whose object shall be to provide and maintain in Manchester aforesaid a building or corn exchange, for effecting contracts of sale therein by sample or otherwise than by bulk, of corn, &c., as the committee shall from time to time appoint."

Clause 2,—*Capital.* "The capital of the company shall consist of 7500*l.*, divided into 150 shares of 50*l.* each."

Clause 3,—*Limit of number of shares.* "No person shall at any time hold as proprietor in his own right more than five shares; and every original proprietor shall, before his execution hereof, pay to the committee the full amount of the shares allotted to him."

Committee and trustees. By clause 4, fifteen persons named were declared to be the present "committee of management," and the parties to the deed of the first part the present "trustees" of the company.

Clause 16,—*Power to create additional shares, &c.* "Two successive extraordinary general meetings,—the latter whereof shall be held within three calendar months from the former, and at each of which meetings two thirds of the votes of the proprietors respectively present shall

The land upon which *the corn exchange is built is freehold, and was conveyed to and is now vested in trustees. The [*519

be in favour of any resolution to be made thereof of the nature specified in this article,—may make any new laws and regulations, or alter or repeal any of the existing laws and regulations of the company,—may, by creating additional shares of 50*l.* each, and by authorizing the sale thereof, increase the capital of the company,—may, in case only a dissolution shall have been previously recommended by the committee, resolve to dissolve the company,—may, with the like previous recommendation, resolve that the site of the corn exchange for the time being shall be changed or enlarged, and a new corn exchange purchased or erected, or that the corn exchange shall be rebuilt wholly or in part, or that any buildings, ground, or hereditaments for the time being belonging to the company, and not required for the purposes thereof, shall be sold or otherwise disposed of,—may, with the like previous recommendation, resolve to raise by way of loan any sum or sums of money by mortgage of all or any of the property of the company, or by other securities,—may give all such directions and invest the committee with such powers in relation to the respective subjects of such resolutions and the terms and manner upon or in which the same shall be carried into effect as to such meetings respectively shall seem expedient."

Clause 18,—*Meetings of committee.* "The committee shall meet once at least in every calendar month, when and where they shall appoint: and an extraordinary meeting thereof may be called by any two committee-men, for such purpose only as shall be specified in the notice thereof hereby required."

Clause 22,—*Corn exchange to be held upon trust for the company.* "The building lately erected by the direction of the committee on certain land in Hanging Ditch, in Manchester aforesaid, which by purchase and exchange hath been acquired for the benefit of the company, and which is vested in the said parties hereto for the first part for the respective estates and interests therein so acquired, shall constitute the corn exchange or building to be used for the purposes of the company, and shall, with the stands and other conveniences and fittings thereof, be held upon trust accordingly by the persons in whom the said land and hereditaments are vested, their heirs, executors, and administrators."

Clause 23,—*Repairs.* "The committee shall from time to time, in their discretion, lay out such moneys and do such acts as they shall think necessary in repairing and altering the buildings and premises for the time being belonging to the company, and insuring the same from damage by fire, or otherwise for preserving, maintaining, and using the said buildings and premises for the benefit of the company."

Clause 24,—*Committee to let stands, &c.* "The committee may from time to time let the use of the respective stands and other conveniences in the said corn exchange or buildings for any period not exceeding at one time the term of one year: and so that the use thereof during such letting be restricted to the purposes of the business for which such exchange is hereinbefore expressed to be established, and be confined to the hours or times which, subject to the control of the general meeting of proprietors, shall be from time to time fixed by the committee for the transaction in the said exchange or buildings of such business. The committee from time to time may permit for hire or otherwise the said exchange or buildings, and the stands or other conveniences, or any part thereof, to be used for public meetings or other purposes which shall not prejudice or impede the free use thereof at the times appointed for such business; and may also from time to time demise or let any rooms, vaults, cellars, buildings, or ground for the time being respectively standing or being upon or under or forming part of the hereditaments and premises of the company, and which shall not be required for the aforesaid business of the exchange, unto any persons, for any term not exceeding seven years, or by the year, or for any shorter period; and every such letting or demise of the said stands, rooms, buildings, ground, and premises shall be at such yearly or other rents, and subject to such covenants and agreements, and generally in such manner in all respects not herein expressly directed as the committee shall think fit."

Clause 27,—*Property, how acquired.* "All purchases, sales, mortgages, demises, and contracts on behalf of the company or concerning any of its property and effects shall be made in the names of such of the trustees as the committee shall think fit: and the trustees shall execute declarations of trust concerning the property and effects vested in them as the committee shall require: and such property and effects shall be under the control of the committee: and any order in writing by them concerning the disposition of or any dealing with the same shall be binding upon the trustees, and be their indemnity in acting thereunder."

Clause 28,—*Receipts and payments.* "The committee shall cause all moneys received on account of the company to be forthwith after the receipt thereof paid into the banking-house of the bankers of the company, to the account of the treasurer or otherwise as the committee shall think fit: all payments on behalf of the company shall be made by order of the commit-

income is derived from letting the offices and cellars under the large room, from letting stands in the hall or large room for the use of sub-

tee; and any such payment exceeding 10% shall be made by checks drawn by the treasurer and countersigned by such one or more of the members of the committee as they shall appoint in that behalf."

Clause 30,—*Annual dividend.* "The annual general meeting shall have power from time to time to declare out of the clear profits of the company a dividend not exceeding such sum as the committee may then recommend to be divided: and any part of the profits may be retained as a reserve fund, and be eventually applied in manner directed by any general meeting, with the previous recommendation of the committee."

Clause 34,—*Legal proceedings.* "The committee may direct any action or other proceeding whatsoever at law or in equity, or in bankruptcy, or otherwise, to be instituted, carried on, or defended, in the name of and against any persons respectively, whether proprietors or not, and in respect of or under the covenants contained herein or in any deed of covenant to be executed by future proprietors, or on account of any debts or demands claimed by or against the company or otherwise in relation to the property, interests, or concerns thereof, or any crime or offence to the injury or fraud of the company; and may refer to arbitration any difference between the company and any person whomsoever, including any individual proprietor; and may compromise, suspend, or determine any such difference, claim, or proceeding; and may give time for the satisfaction of any debt or liability to the company, and abandon any debt which may appear to the committee to be bad."

Clause 36,—*General powers of committee.* "Subject to the powers hereby vested in general meetings of proprietors, and the express provisions of these presents, the committee shall have the entire and exclusive management of the affairs of the company, and, in cases not provided for by the then-existing regulations, may act as they shall think best for the welfare of the company; and an extraordinary meeting of the committee may from time to time make by-laws and regulations consistent with such existing regulations, and may alter or repeal any by-law or regulation so made."

Clause 40,—*Trusts upon which property held by trustees.* "The trustees shall hold the property of the company vested in them, in trust for the company; and shall apply, demise, sell, or otherwise dispose of the same as the committee shall direct, and for that purpose shall enter into and execute all proper contracts and assurances, and the same shall bind the proprietors and their representatives as fully as if they respectively had been parties thereto."

Clause 44,—*New trustees.* "Whenever the trustees of the company shall, by death, resignation, or other cause, be reduced to three, or if the committee shall think the earlier appointment of new trustees advisable, the committee shall at an extraordinary meeting thereof elect any proprietors, whether members of the committee or not, to be new trustees, so that the continuing and new trustees shall not exceed twenty."

Clause 46,—*Vesting of property in trustees.* "The committee shall, as often as they shall see occasion, procure by all proper means such conveyances and transfers of the trust property and effects vested in any person who by death, removal, or other cause shall have ceased to be a trustee of the company, or in his representatives, as shall be expedient for vesting the same in the then trustees of the company, or such of them as the committee shall direct."

Clause 48,—*Shares to be personalty.* "As between the proprietors and their respective representatives, the property of the company, and the shares of the capital thereof, shall be personal estate."

Share register book to be kept, &c. Clause 49 provides for the keeping of a "Share Register Book," the entries in which are by Clauses 60, 61, and 62, to be evidence of the ownership of shares, and binding on the shareholders therein.

Clause 50,—*Certificates of shares.* "A certificate specifying the particulars of the shares held by each proprietor shall be delivered to him as the committee shall direct, which certificate may be renewed at the discretion of the committee as often as there shall be occasion; and, upon any other person becoming a proprietor of any share, such alteration shall be made in the existing certificates, by the giving up and cancellation of old and the substitution of new ones, as shall be necessary, in order that each proprietor may, if required by him, have a certificate showing the number and particulars of his then actual shares."

Clause 54,—*Transfer of shares.* "The shares shall be transferred in such form as the committee shall from time to time appoint, and shall not be transferable in any other manner, so as to entitle any person, as between him and the company, to become a proprietor, or to any other benefit in respect thereof."

Clause 56,—*Commencement of proprietorship.* "Every person whose name shall be so entered as the new proprietor of any share, shall, as to all obligations in respect of the same, be a proprietor from the time when such entry shall be made; but, as to all dividends, rights, or privi-

scribers on the day on which *the Corn Market is held, and for the right of personal entrance to the building, and also from the money paid for the use of the large hall for public meetings, concerts, &c. [*520]

The company has only been registered under the *7 & 8 Vict. c. 110, s. 58; and the following is a copy of the certificate:— [*521]

"No. 290.

"Certificate of formal registration of the Manchester Corn Exchange Company, pursuant to the act 7 & 8 Vict. c. 110.

"*I, Frederic Rogers, Esq., registrar of joint-stock companies, do hereby certify that the company of proprietors of The Manchester Corn Exchange Company is registered pursuant to the 58th section of the above-mentioned act. [*522]

"*Given under my hand and sealed with my seal of office this 8th day of January, 1845. [*523]

"FREDERIC ROGERS,
"Registrar of Joint-Stock Companies."

It was objected,—first, that the said company, being *registered as above, became a corporation; and the case of *Bulmer, app., Norris, resp.*, 9 C. B. N. S. 19, *K. & G. 321, was cited on that point,(a)—secondly, that the interest of the proprietors was merely personal, and did not confer the right of voting. [*524] [*525]

Upon these grounds the revising-barrister disallowed the vote. He also disallowed the votes of thirty-eight other claimants under precisely similar circumstances, whose cases were consolidated with the principal case.

If the decision was wrong, the names of James Bennett and of the other thirty-eight persons were to be restored to and inserted in the register.

Hannen, for the appellant.—A joint-stock company only becomes incorporated on complete registration: 7 & 8 Vict. c. 110, ss. 25, 58, 59. The case of *Bulmer, app., Norris, resp.*, where the company was completely registered, is therefore inapplicable. Then it is said that the shares in this company are personalty only. It is true, that, by one of their rules (the 48th) it is declared, that, as between the proprietors, the shares shall be deemed to be personal estate. But private agreements between parties cannot, it is submitted, have any effect upon the legal incidents which attach to real estate. The point

leges arising from such share, shall not, except in cases provided for by the 53d article [cases of executors or trustees under wills], be such proprietor until he shall have executed a deed of covenant, in such form as the committee shall require, to abide by the regulations of the company; and, after such execution, provided the same be within two calendar months from such entry, he shall be entitled to such share for all purposes from the time of the aforesaid entry, but otherwise only from the time of his actual execution of such deed; and, in the latter case, all intermediate dividends or profits in respect of such share shall sink into the general funds of the company, for the benefit thereof: Provided that, if such new proprietor shall have previously executed these presents, or such deed of covenant, and shall at the time of such entry continue bound to abide by the regulations of the company, he shall become in respect of the same share a proprietor to all purposes from that time, without then executing such deed."

(a) It was there held that the members or shareholders of a joint-stock company incorporated under the 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14, have no such freehold interest, legal or equitable, in lands held by the corporation, as to enable them to be registered as electors,—their rights being confined to a proportionate share in the profits of the company.

is considered in the judgment in *Bulmer, app., Norris, resp.*, where *Baxter, app., Brown, resp.*, 7 M. & G. 198 (nom. *Baxter, app., Newman, resp.*, 8 Scott N. R. 1019, 1 Lutw. Reg. Cas. 287), is referred to. It will be said that the point was not expressly decided in *Baxter, app., Brown, resp.* But the opinion of the court seems to leave no room for doubt. "In general," say the court, "there can be no *526] *question but that for all purposes necessary to effectuate the intention of the parties, personal estate may be considered as real, and real estate as personal, by a court of equity; as in the ordinary instance of money agreed or directed to be laid out in land: and so in the instance of a real estate under an absolute trust or direction to sell: and against this general rule our decision in the present case will not in any manner militate. But, notwithstanding this acknowledged doctrine of the court of equity, no one can deny that the land still remains land, and nothing else; and there is no authority or decision, that, for the collateral purpose of giving a vote, which has no bearing upon or reference whatever to the objects of the copartnership, the right of the cestui que trust should not remain just as it would have been without such declaration of trust. For, as to the declaration by the copartners in the deed, 'that the lands and buildings shall be deemed and considered as or in the nature of personal estate, and not real estate,' we think the generality of these words must necessarily be limited by the subject-matter of the trusts declared by the deed, and that they can extend no further than the object and purposes of the deed require: and, further, we think it may be considered as a very doubtful question whether the private agreement of parties, or any authority short of that of an act of parliament, can deprive the owners of the freehold of the right of voting for a member of parliament, which is a right inherent in the owners of the freehold, not for their own benefit, but for that of the community of which they form a part. But, however that may be, it appears to us such right is left altogether untouched by the objects and purposes for which the trusts of the deed now under consideration are created and declared." The authority of that case stands unimpeached by anything said in the judgment in *Bulmer, app., Norris, resp.*

*527] **Welsby* (with whom was *Grantham*), for the respondent.—As to the second question, whether the interest of the shareholders in this company is realty or personalty, since the decision of this court in *Baxter, app., Brown, resp.*, the rule by which it is governed has been correctly stated by Mr. Rogers (9th edit. 21) thus,—“With regard to shares in navigable rivers, canals, &c., the legislature has in many cases declared them to be *real* property; in others, where no such express declaration has been made, but where the shareholders in respect of their shares are actual proprietors of the soil, or where they have such rights arising in and out of the soil as amount to an incorporeal hereditament, the law considers them *real* property. In other cases, where their right amounts to an easement only, there is no interest in land: *Buckridge v. Ingram*, 2 Ves. jun. 652; *The King v. Palmer*, 1 B. & C. 546 (E. C. L. R. vol. 8), 2 D. & R. 793; *The King v. The Earl of Portmore*, 1 B. & C. 551, 2 D. & R. 798; *The King v. Thomas*, 9 B. & C. 128 (E. C. L. R. vol. 17); *The King v. The Aire and Calder Navigation*, 3 B. & Ad. 139 (E. C. L. R. vol. 23).

The principle upon which the right of voting depends in these cases, seems to be as follows,—first, when the shareholders form a part of a corporation aggregate, and the property is vested in the corporate body, the individual corporators cannot vote,—secondly, where the shareholders do not form part of the corporate body, but have only a right to share in the real produce of the property of the company, whatever that may be, they cannot vote, because such an interest is personal property only, unless there is something in the act showing a contrary intention; *Bligh v. Brent*, 2 Y. & C. 268, 3 M. & W. 422,—thirdly, where an act of parliament declares the shares to be personal estate, no vote can arise out of it; 8 & 9 Vict. c. 16, s. 7,—fourthly, if, as in the *New River* case, the individual corporators *have the property vested in themselves, the corporation [*528 having only the management of it, the individual corporators would probably be entitled to vote. The only difficulty in such a case is, to ascertain in what place the party has a sufficient interest in land to entitle him to vote, as in the instance of the *New River*, which runs through several counties: 2 Ves. 182,—fifthly, if there be no act of incorporation, but lands are purchased, and conveyed to certain individuals, who execute a deed of trust to divide the surplus profits among the subscribers, the shares of the latter would not the less be personal estate because land was employed as the instrument to produce such profit; and, as such subscribers take no interest in the land, they would not be entitled to vote. But, if, on the other hand, the land be conveyed to the subscribers themselves, or to trustees for their use, they would then be in the possession of the land, and entitled to vote. The case of *Baxter*, app., *Brown* (or *Newman*), resp., seems to establish this last proposition. In that case, A., B., C., and D. subscribed money, which was applied to the purchase of freehold land conveyed to A. and B. in fee, and to the erection of a mill built on the land, and to the buying of machinery for the use of the mill. By a partnership deed executed by the four, it was declared that A. and B. should stand seised and possessed of all the estates real and personal of the partnership, in trust for themselves and the other partners as part of their stock in trade,—that the land and mill should be deemed personal and not real estate, and be held in trust as part of the stock in trade. A. and B. had also power to mortgage, which they did not exercise, but borrowed money, giving their own bonds and notes as a security. It was held that each partner took an equitable interest in the realty to the extent of the amount of his shares, and *that the clauses declaring that the lands, &c., [*529 should be considered as personalty, did not extend beyond the regulation of the enjoyment of the property. The court expressed a doubt whether anything short of a statute could deprive the owner of a freehold of his elective franchise." Here, by the very constitution of the company, the shareholders have no interest in the land itself, but only in the profits. In *Bligh v. Brent*, 2 Y. & C. 268, it was expressly held that real estate held for the purposes of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. [WILLIAMS, J.—In *Myers v.*

Perigal, 11 C. B. 90 (E. C. L. R. vol. 73), this court held that shares in a banking company, where the real estate was vested in trustees, and the shareholders were entitled to profits only, were not within the mortmain acts.] And that was confirmed by Sir L. Shadwell, V. C., *Myers v. Perigal*, 16 Simons 533, and by Lord St. Leonards, *Myers v. Perigal*, 2 De Gex, M'N. & G. 599. The transfer of the shares here is to be made in a manner which is wholly inapplicable to the passing of real estate. Baxter, app., Brown, resp., was a totally different case from this. That was a private partnership. Each of the partners had an interest in the real estate, because each subscribed money to buy the land. The conveyance, it is true, was to two of them only, but in trust for themselves and their partners. It was clearly an equitable freehold in the *cestui que trust*. [WILLIAMS, J.—Speaking of Baxter, app., Brown, resp., in *Myers v. Perigal*, 2 De Gex, M'N. & G. 622, Lord St. Leonards says: "I have some difficulty in reconciling that case with the late authorities: but, looking at the act of parliament regulating the qualification to vote, it gives the same *530] right to vote *in respect of an equitable interest as of the legal ownership; and the decision, therefore, only amounted to this, that the right to vote being conferred by act of parliament, could not be taken away except by act of parliament. If such was not the effect of that decision, it is undistinguishable from the later decision of the same court, which has now certified that this case does not fall within the Statute of Mortmain. I am consequently relieved from the weight of the authority of Baxter, app., Brown, resp." The deed there could not be permitted to control the act of parliament giving the vote.

Hannen, in reply.—In no case has such a question as this been raised, except in the case of a corporation. [WILLIAMS, J.—*Myers v. Perigal* was not the case of a corporation. *Welsby*.—Neither was *Watson v. Spratley*, 10 Exch. 222: that was the case of shares in a cost-book mine. WILLIAMS, J.—In *Williams v. Hall*, 6 De Gex, M'N. & G. 74, it was held by Lord Cranworth that shares in an incorporated company are not an estate or interest in land within the meaning of the Statute of Mortmain; nor does it make any difference that the act of parliament incorporating the company does not contain a clause declaring the shares to be personal estate. He puts it as a settled point.] Individuals cannot, it is submitted, by agreement among themselves, alter the nature and incidents of real property. Though the legal estate is in the trustees, the proprietors reserve to themselves the full control over it by their committee of management. The case, therefore, cannot be distinguished from that of an ordinary partnership, one member of which is permitted to hold the land, the others directing how it shall be employed. [KEATING, J.—Would an original shareholder by transferring his shares cease to *531] have an *interest in the freehold?] The transferee would become the *cestui que trust*, and he would thus acquire such an equitable interest as to confer on him a vote, leaving the legal estate where it was.

ERLE, C. J.—I am of opinion that the revising-barrister in this case was right in holding that the franchise was not gained. He was right in respect of one of the points taken before him, viz., that the shares

in this company were not an interest in land. As to the other point, I think he was wrong in holding that the shareholders were in the nature of a corporation. The company was formed for the purpose of establishing a Corn Exchange in Manchester. The deed shows how the land was to be held,—the legal estate to be vested in trustees for ever. The committee of management was by means of rents and subscriptions to make profits out of the undertaking, and, after payment of expenses and outgoings, to divide the surplus amongst the shareholders. The effect of that deed in my opinion is, to give to each shareholder a right to his share of the profits, but not to confer upon him any right in the land which is vested in the trustees. It is clear that that was the intention of the deed. The declaration that the shares are to be deemed personal estate only, the mode of transfer, which is inconsistent with the rules of law as to the transfer of real estate, and the whole tenor of the deed, seems to constitute a sort of interest which is well known and has frequently been the subject of consideration in dealing with joint-stock companies. Is there, then, any law which prevents that intention from having effect? The members of these associations may agree that the land shall be held by the trustees in such manner as they may think fit. The legal estate is by the 40th and 46th clauses declared *to be vested in the [*532 trustees, who are to act under the direction of the committee of management, having themselves very limited powers. The committee are to form the governing body, letting the rooms and cellars, &c., and doing all those things which are to produce profit to the shareholders. That is the nature of the contract which these persons have entered into. The case of *Bulmer, app., Norris, resp.*, where a very learned and elaborate judgment was given by one of my Brethren, goes very fully into the authorities. It was a case of a joint-stock company incorporated under the 19 & 20 Vict. c. 47 and 20 & 21 Vict. c. 14: but it is assumed in the judgment that there may be many forms of companies contemplating the vesting of their lands in trustees, the members or shareholders having a right to participate in profits, but possessing none of the rights and burthened with none of the liabilities which belong to the proprietors of real estate. So it is with respect to companies taking advantage of the provisions of the Joint Stock Companies' Acts. Such also is the very learned judgment of Martin, B., in the case of *Watson v. Spratley*, 10 Exch. 222, to the effect that shares in a company established for the purpose of working a mine on the cost-book principle,—the mine being vested in the purser, and the co-adventurers being only entitled to a share of profits,—were not an interest in land within the 4th section of the Statute of Frauds. Although the judges were divided as to whether or not the opinion of the jury should have been taken upon the facts, yet they all agree, that, if the purser of the mine, who had himself the set or grant of it, had the mine and machinery and plant vested in him in trust to employ the machinery in working the mine and making the most profit of it for the benefit of the co-adventurers, who were to share the profit only, such interest was *transferable [*588 by parol, and might be bargained for by parol. My Brother Martin, after referring to *Bligh v. Brent*, 2 Y. & C. 268, and *Duncuft v. Albrecht*, 12 Sim. 189, for the purpose of showing that shares in

an incorporated (by act of parliament) joint-stock company, a part of whose capital stock consists of land, do not constitute an interest in land, goes on to say: "This being the well-established law in regard to shares in incorporated joint-stock companies, the present question is, whether it be different in regard to shares in unincorporated ones. It would be unfortunate if it were found to be so. I think, however, there is no such difference. In substance and reality, the interest of the shareholder in the mining unincorporated company and in the incorporated joint-stock company is exactly the same. In both it is an interest in the ultimate profits. In neither can the shareholder directly intermeddle or deal with the land; and although apparently in a mining company the interest of the shareholder in land seems to be greater than in ordinary trading joint-stock companies, nevertheless almost all trading companies have houses or land, and without them their business could not in general be carried on, as was observed by the Vice-Chancellor in *Hilton v. Giraud*, 1 De Gex & S. 187." All the judges agreed, that, if the jury found that it was the intention of the parties that the land should vest in the purser, and that the co-adventurers should only be entitled to a share of profits, the law would carry that intention into effect. The case of *Myers v. Perigal*, where it was held that shares in such a company as this are not within the Mortmain Act, is to the same effect. And, whether the dissatisfaction of Lord St. Leonards with the decision of this court in *Baxter*, app., Brown (or Newman), resp., be well founded or not, *534] the tenor of the cases to which I have adverted *satisfies me that the conclusion arrived at by the revising-barrister here was correct.

WILLIAMS, J.—I am of the same opinion. This case must be governed by the principle which has been established in the several cases which have been referred to in the course of the argument, and especially in the case of *Edwards v. Hall*, 6 De Gex, M'N. & G. 74, where it was held by Lord Cranworth, upon a careful review of all the authorities, that shares in joint-stock companies,—canal, waterworks, and gas-light companies,—are not an estate or interest in land within the meaning of the Statute of Mortmain, whether the act of parliament incorporating the company does or does not contain a clause declaring the shares to be personal estate. That principle has, in *Myers v. Perigal*, been solemnly decided to apply equally to a company not incorporated by act of parliament. The principle established by these cases is this, that a shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits. Applying that principle to the present case, it seems to me, that, according to the terms of the deed of settlement which governs the affairs of this company, the income of the real estate in respect of which the franchise is claimed is to be taken by the committee appointed to conduct the business of the company: and they, having received the income and made the necessary disbursements for carrying on the concern, are to pay over the balance to and amongst the shareholders. What each shareholder is entitled to, therefore, is, not any particular income arising from the land held by the trustees. Neither in law nor in equity is he so entitled. All he is entitled to, is,

a proportionate share *of the profits. According, therefore, to the principle which led the courts in those cases to hold that [*535 shares in the companies which came under consideration before them did not constitute an interest in land, I am of opinion that the shareholders in this case have no such interest, legal or equitable, in this land, or in the income arising from it, as to confer upon them the franchise.

KEATING, J.(a)—I am of the same opinion. I think the shareholders in this company have no interest either legal or equitable in the land so as to acquire a right to vote in respect of it. The deed of settlement under which they claim clearly does not confer it. That deed creates a certain amount of capital, which is to be divided into a certain number of shares. Land is to be purchased and a corn-exchange built; and the business of the company is to be conducted by a committee of management by whom the profits are to be divided amongst the shareholders. The shares are to be transferable as shares are usually transferable in joint-stock companies. Such being the nature and constitution of the company, what are the rights of an individual shareholder? Could he go at any time and receive any particular moneys for rent of rooms or standings in the market? Certainly not. All he is entitled to, is, the dividend upon his shares resulting from the profits made by the company. Unless, therefore, Mr. Hannen's proposition,—that it is not competent to parties so to deal with real property as to take away from it one of its incidents, viz., its capacity to confer a vote,—can be sustained, the claim of the appellant in this case cannot be allowed. That that proposition cannot be sustained, is clearly settled by the cases of *Watson v. Spratley*, 10 Exch. 222, and **Myers v. Perigal*, 11 C. B. 90, 16 Simons, [*536 533, 2 De Gex, M'N. & G. 599; nor is there any authority at all that I am aware of in its favour. And, although the court in *Baxter, app., Brown (or Newman), resp.*, 7 M. & G. 198 (E. C. L. R. vol. 49), 8 Scott N. R. 1019, 1 Lutw. Reg. Cas. 287, held, that, where real property was held by two upon trust for the benefit of themselves and their partners in an ordinary partnership as part of their partnership joint stock in trade, each partner had an interest in the realty corresponding with the amount of his share in the partnership,—they did not, I apprehend, intend to lay it down that the partners might not, if so minded, have dealt with the realty in such a way as to disqualify themselves from voting in respect of it. For these reasons, I am of opinion that the revising-barrister rightly decided against the claim of these shareholders to be registered.

Decision affirmed, with costs.

(a) Byles, J., was absent by reason of indisposition.

Borough of KIDDERMINSTER.

ALFRED WILLIAM CROWTHER, Appellant; GEORGE BRADNEY, Respondent. Nov. 23.

Where there are two lists of voters for a borough, the notice of objection should distinctly state on which the objector's name appears.

The parish of K. consists of the *borough* of K., the *foreign* of K., and the hamlet of L. M. (which latter is not within the parliamentary borough),—for each of which separate overseers are appointed and separate rates are made. Two lists of persons entitled to vote in K. are made out,—one, of persons so entitled in respect of property occupied within the *borough* of K.; the other, of persons so entitled in respect of property occupied within the *foreign* of the parish of K.—the former is signed by the overseers of the *borough*, the latter by the overseers of the *foreign*:—Held, that a notice of objection signed "G. B., on the list of persons entitled to vote in the election of members for the *borough* of K., in respect of property occupied within the *parish* of K.," was insufficient.

At a court held for the revision of the lists of voters for the
 *537] borough of Kidderminster, George Bradney *objected to the name of Alfred William Crowther being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster.

The notices of objection both to the overseers and to the said Alfred William Crowther were signed thus: "George Bradney, of Wharf Hill, on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster."

The ancient parish of Kidderminster consists of the borough of Kidderminster, the foreign of Kidderminster, and the hamlet of Lower Mitton, for each of which separate and distinct overseers, churchwardens, highway surveyors, and other parochial officers are appointed, and separate and distinct rates are laid.

The hamlet of Lower Mitton is within the parliamentary borough of Bewdley.

The said George Bradney, in his notices of objection to the respective overseers of the said parishes or districts of Kidderminster borough and Kidderminster foreign, addressed his notices respectively as follows: "To the overseers of the parish of the borough of Kidderminster," and "To the overseers of the foreign of the parish of Kidderminster."

Two lists of persons entitled to vote for the parliamentary borough of Kidderminster were made out and published in the present year,—one headed "List of persons entitled to vote in the election of a member for the borough of Kidderminster, county of Worcester, in respect of property occupied within the said borough of Kidderminster," purporting to be signed by three persons describing themselves as "overseers of the borough of Kidderminster," and the other headed "List of persons entitled to vote in the election of a member
 *538] for the borough of Kidderminster, in the *county of Worcester, in respect of property occupied within the foreign of the parish of Kidderminster," purporting to be signed by three other persons describing themselves as "overseers of the foreign of Kidderminster."

The name of George Bradney was on the first-mentioned list.

It was objected, on behalf of the said A. W. Crowther, that the notices of objection, which were in all other respects good, were insufficient, inasmuch as the said George Bradney stated himself to be on "the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster," whereas he should have stated on which of the said two lists of voters his name appeared.

The revising-barrister held that the notice of objection was sufficient; and, the said Alfred William Crowther having failed to prove a qualification, he expunged his name from the list of voters.

Twelve other persons whose names and qualifications were set out in a schedule annexed to the case were also objected to by the said George Bradney, and, failing to prove their qualifications, the revising-barrister expunged their names; but, the like objection to the notice of objection in each of their cases existed and was taken before him, and he gave the same decision thereon, and consolidated them with the principal case.

If the court should be of opinion that such notices of objection were insufficient, then the name of the said A. W. Crowther and also the names of the several other persons mentioned in the schedule were to be restored to the respective lists of voters from which the same had been expunged, and the register of voters was to be altered accordingly. But, if the court should be of opinion that such notices of objection were sufficient, the register of voters was [*539 to remain unaltered.

Karslake, Q. C. (with whom was *The Hon. R. Bourke*), for the appellant.—This objection arises upon the 17th section of the 6 & 7 Vict. c. 18, which enacts that every person whose name shall have been inserted in any list of voters for any city or borough, may object to any other person as not being entitled to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall give notices according to the forms numbered 10 and 11 in Schedule B., "to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted," and also to the person objected to. The forms given in the Schedule require the objector's signature thus:—"A. B., of, &c., on the list of voters for the parish of —." The parish of Kidderminster consists of the borough of Kidderminster, the foreign of Kidderminster, and the hamlet of Lower Mitton,—for each of which separate overseers are appointed. Two lists of persons entitled to vote in Kidderminster are made out,—one, of persons so entitled "in respect of property occupied within *the borough of Kidderminster*," the other, of persons so entitled "in respect of property occupied within *the foreign of the parish of Kidderminster*:" the former is signed by "the overseers of the *borough of Kidderminster*," the latter by "the overseers of the *foreign of Kidderminster*." The notice of objection here is signed by "George Bradney, on *the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster*." This is clearly insufficient. The objector should have pointed [*540 accurately the situation of the property he occupies, in order

to show to which list reference is to be made, to ascertain whether or not he is a person entitled to object. [WILLIAMS, J.—The objection to the notice is, that it would require the voter to search two lists. The point arose last year in a case of Samuel, app., Hitchmough, resp., 13 C. B. N. S. 3 (E. C. L. R. vol. 106), K. & G. 522. There, a notice of objection to a borough voter, in the form prescribed by the Schedule B. No. 11, described the objector as being "on the list of voters for the parish of St. Paul." It appeared that there were two lists made out for the parish of St. Paul., viz., the 10*l*. or new qualification list, and the reserved right list. The revising-barrister decided that the description of the objector was insufficient, for not stating on which of the two lists his name appeared. But the court reversed his decision.] There, the objector had complied literally with the terms of the statute: there were two lists, both made out by the same overseers, and together forming one document. In Eidsforth, app., Farrer, resp., 4 C. B. 9 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517, the objector was described as "R. F., of, &c., on the list of voters for the borough of L." The register of voters for the borough of L. consisted of four separate lists, viz. one of 10*l*. householders for each of three townships comprised in it; and one of the freemen of the borough. The objector's name was on the last-mentioned list only; and the court held the description insufficient. Maule, J., there says: "The Registration Act, the 17th section of which is the subject of contention in the present case, was passed chiefly to remedy certain defects and inconveniences found in the operation of the 2 W. 4, c. 45. One of those defects was, that, under s. 47 of the last-mentioned act, and the Schedule I. No. 5, appended thereto, viz. in the notice of objection to be given to the overseers or *541] *town-clerk, there was a want of convenient particularity, and that the act was totally silent as to notice to the party objected to. The spirit of the 6 & 7 Vict. c. 18, is, to afford additional facilities to parties in sustaining their right to be on the register, if they have it. The power to object is not given in respect of the party's franchise, but only in respect of his name being on some one list of voters for the city or borough. When a man has a power conferred upon him by act of parliament of dealing with the rights of another, he must show distinctly that he falls within the description of persons to whom such power is given." Here, there is no such list as the objector describes; for, the "parish" of Kidderminster consists of three separate divisions, one of which (the hamlet of Lower Mitton) is out of the parliamentary borough, and his property may be there. His right to object exists only by reason of his being on a particular list. In Tudball, app., The Town Clerk of Bristol, resp., 7 Scott N. R. 486, 5 M. & G. 6, 1 Lutw. Reg. Cas. 7, the objector was described as "W. T., of, &c., on the list of voters for the parish of Clifton:" the name of W. T. appeared on the list of *freemen* of the city of Bristol only, and on that list he was described as of the parish of Clifton; and the notice was held insufficient. Tindal, C. J., there says: "It appears to me that the party objecting in this case has failed properly to describe himself: he has followed the form No. 11 in the schedule more closely than he should have done. He has untruefully described himself as being

'on the list of voters for the parish of Clifton,' whereas in fact his name only appears upon 'the list of the freemen of the city of Bristol.' It may be that the lists of voters for the city are very numerous: any informality, therefore, of this sort would necessarily throw upon the party objected to a greater degree of difficulty in ascertaining by whom the objection is *made than the act of parliament contemplated." [KEATING, J.—Suppose the objector had described [*542 himself as being "on the list of voters for the borough of Kidderminster," would not that have sufficed?] It may be: but he does not say so.

Welsby, for the respondent.—It is assumed on the other side that there are three parishes in Kidderminster. That, however, is not so: there is but one parish, which consists of three divisions which may be called townships, viz., the borough and the foreign of Kidderminster, and the hamlet of Lower Mitton. [BYLES, J.—Each has its separate overseers, churchwardens, &c., and separate rates are made for each.] It does not appear that there is more than one parish church. [BYLES, J.—There must be other places of worship: and the lists must appear on all,—6 & 7 Vict. c. 18, s. 23.] The case of Samuel, app., Hitchmough, resp., is very little removed from this case. Both lists must of necessity appear on the church door. [BYLES, J.—Both were in that case made out by the same overseers: here the lists are made out by two different sets of overseers.] Both form substantially one list,—the borough list. The revising-barrister finds that the objector's name was on one of the lists; he does not find that anybody was or could be misled; but he finds that the notice was sufficient.

ERLE, C. J.—Where there are two separate lists, the person object-ing must state distinctly which of the two he is on. The notice here is equivalent to the party's saying, "I am on one of the lists of voters for the borough of Kidderminster." The decision of the revising-barrister was wrong, and must be reversed.

The rest of the court concurring,

Decision reversed.

*City of EXETER.

[*543

SIDNEY RICE FORCE, Appellant; THOMAS FLOUD,
Respondent. Nov. 23.

The notice of objection given to a county voter was as follows:—"To Mr. Sidney Rice Force, I hereby give you notice that I object to the name of Force, Sidney Rice, being retained on the list," &c.—inserting the name of the party instead of the pronoun "your," which is in the form No. 11, Sched. B. (6 & 7 Vict. c. 18): Held, a sufficient compliance with s. 17.

Held also, that, if necessary, this was an inaccuracy of description which was amendable under s. 101.

At a court held for the revision of the lists of voters for the city of Exeter, Thomas Floud objected to the name of Sidney Rice Force being retained on the list of persons entitled to vote as occupiers in the election of members for the city of Exeter.

Sidney Rice Force stood on the occupiers' list of the parish of St. Sidwell thus:—

Christian name, &c.	Place of abode.	Nature of qualification.	Street, &c., where situate, &c.
Force, Sydney Rice.	Dix's Field.	House.	Dix's field, in succession from house Sidwell Street.

The notices of objection were duly served; and the only question raised, was, as to the form of the notice of objection given to the party objected to, which was in the following form:—

"To Mr. Sidney Rice Force.

"I hereby give you notice that I object to *the name of Force, Sidney Rice*, being retained on the list of persons entitled to vote as occupiers in the election of members for the city of Exeter. Dated this 20th day of August, 1863.

(Signed) "THOMAS FLOUD, of Bedford Circus, in the precinct of Bedford, on the list of voters for the said precinct of Bedford, in the said city of Exeter."

On the part of the appellant, it was contended that this notice was bad, because it was not according to *the form No. 11 in the *544] Schedule B. of the statute 6 & 7 Vict. c. 18.

It was argued that the notice ought to have run thus,—"*I object to your name being retained,*" &c.; and great stress was laid on the circumstance, that, by the 17th section of the statute, the notice to the party objected to is required to be "*according to the form numbered 11, Schedule B,*" omitting the words "*or to the like effect,*" which occur in the 15th and 17th sections in speaking of other notices.

It was also urged that the transposition of the Christian names and surname in the body of the notice was likely to mislead the party receiving the notice, as to its meaning; and that there were no words to show that the person objected to was the same person as the party to whom the notice was addressed.

There was no other person of the same name on any list of voters for the city of Exeter.

The revising-barrister was of opinion that the notice was not bad merely because it departed from the very words of the form No. 11, Schedule B., if it was so framed as to inform with sufficient clearness the person to whom it was addressed that the objection was directed against his name: and he was of opinion that the name of the person objected to was so denominated in the notice as to be commonly understood, and that it sufficiently appeared on the notice that the person whose vote was objected to was Sidney Rice Force, the person to whom the notice was addressed: and he was satisfied that the person to whom the notice was addressed, and on whom it was served, was not misled or in danger of being misled by the form of the notice. He therefore decided that the notice was good, and required Sidney Rice Force to prove his qualification, which he failed to do: whereupon he expunged his name from the list.

*At the same court Thomas Floud and Merlin Fryer respectively objected to the names of the several other persons whose [*545 names and qualifications were set forth in a schedule annexed to the case being retained on the several lists respectively mentioned in the said schedule of persons entitled to vote for the city of Exeter.

In all these cases, the notice to the party objected to was precisely similar to the notice in the case of Force, except that the word "freemen" or "freeholders," as the case might be, was in the proper instances used for the word "occupiers." In all these cases the notices were duly served; and each notice was in the heading thereof duly addressed to the party objected to, the Christian name preceding the surname, and then in the body of the notice the names were transposed, as in Force's case. In these cases, there was not any instance where two persons of the same name stood on any list of voters for the city of Exeter.

The revising-barrister was in all these cases of opinion that the name of the person objected to was so denominated as to be commonly understood, and that it sufficiently appeared on the notice that the person whose vote was objected to was the person to whom the notice was addressed: and he was satisfied in all these cases that the person to whom the notice was addressed and on whom it was served was not misled or in danger of being misled by the form of the notice.

The validity of these objections in all the cases hereinbefore mentioned depending upon the same point of law, the revising-barrister ordered them to be consolidated.

If the court should be of opinion that the decision of the revising-barrister was wrong, and that the notices of objection were invalid by reason of their form, *then the names of the appellant, Sidney [*546 Rice Force, and of the several other persons (eighty-nine in number) whose names and qualifications were set forth in the schedule, were to be restored to the respective lists from which they had been expunged.

Karslake, Q. C., for the appellant.—The notice of objection in this case was not a due compliance with the statute. The 17th section of the 6 & 7 Vict. c. 18, provides that the objector shall give a notice to the overseers or town-clerk, "according to the form numbered 10 in Schedule B., or to the like effect; and "shall also give or cause to be left at the place of abode of the person objected to, a notice *according to the form numbered 11,*"—omitting the words "or to the like effect," which words do occur in s. 7, when speaking of the notice of objection to be served on a county voter. The form thus prescribed must be implicitly followed: no departure whatever from it will be allowed. *Wansey, app., Perkins, resp. (Quigley's Case), 7 M. & G. 127 (E. C. L. R. vol. 49), 8 Scott N. R. 954, 1 Lutw. Reg. Cas. 235. Cresswell, J., there says,*—"It may be laid down as a safe rule in the construction of acts of parliament, that we are to look at the words of the act, and to render them strictly, unless manifest absurdity or injustice should result from such a construction. And it is no part of our duty to inquire whether or not this construction is the most beneficial for the party. Undoubtedly, the notice of objection might be so framed as not to put the party objected to to the trouble of casting about to

ascertain to what particular qualification the objection was intended to apply. But we must look to the form as it is given, and not speculate upon how it might have been given." And Erle, J., adds,—
 "The words of the act and of the schedule are perfectly clear; but it
 *547] has been argued that we ought to alter *the act, because of some inconvenience that may result from a too strict adherence to it. We ought to use such a power as that of interpreting acts of parliament in any other but the strict sense of the words with the greatest scrupulosity; and certainly we cannot exercise it where the law is so clearly expressed as in this case." The objector has a power conferred upon him by the statute which is to be exercised in a particular manner: he can only exercise the right subject to the condition. In *Eidsforth, app., Farrer, resp.*, 4 C. B. 9 17 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 517, Maule, J., says: "When a man has a power conferred upon him by act of parliament, of dealing with the rights of another, he must show distinctly that he falls within the description of persons to whom such power is given. Whether that is so or not, reason and good sense would seem to show that it would be convenient that it should be so. The 17th section of the 6 & 7 Vict. c. 18 requires the notice to the party objected to to be *in the form given in Sched. B. No. 11.*" If equivalents are allowed, numerous questions will be raised as to what is or is not a sufficient compliance with the requirements of the act. Where a precise form is given, it is infinitely more convenient that it should be followed strictly. [BYLES, J.—If the pronoun "your" had been there, what would it have stood for?] "Of you," no doubt. Then, the transposition of the Christian and surnames was calculated to mislead. The revising-barrister had no power under s. 101 to correct this. There is no misnomer or inaccuracy of description of any person, place, or thing. There are no words there which can dispense with the necessity of following strictly a form given by the act.

Mellish, Q. C., for the respondent, was not called upon.

*548] ERLE, C. J.—I am of opinion that the decision of *the revising-barrister in this case was right. Whether the legislature did or did not intend to make a difference between the two forms No. 10 and No. 11 in Schedule B. to the 6 & 7 Vict., I am satisfied that the objector here has complied with all the essential requirements of the statute. One objection urged, was, that, if the actual name of the voter was inserted, instead of the pronoun, the notice would be void, because not a literal compliance with the form, the words "or to the like effect" not being there. I cannot think the legislature intended to require that useless literal nicety of compliance with the form given. I think the requirement of the section is well observed by putting in the name of the person objected to, instead of the pronoun. The other objection is, that the surname of the person objected to stands first in the list of voters, and that, in the notice, the names are reversed. I do not see how the party could be misled by this, especially as the revising-barrister has found that there was no other person of the same name on any list of voters for the city of Exeter. The 101st section of the 6 & 7 Vict. c. 18 provides that "no misnomer or inaccurate description of any person, place, or thing

named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice as to be commonly understood." Here, the revising-barrister has found that the name of the person objected to was so denominated in the notice as to be commonly understood: and I think the misdescription, if there was any, is within the curative power of that section.

WILLIAMS, J.—I also am of opinion that the decision *of the revising-barrister was right. The question is whether the [549 notice here given was according to the form numbered 11 in Schedule B. to the 6 & 7 Vict. c. 18. I think it would be absurd to hold that the language of the form there given must be servilely followed, and that any the slightest variance from it will vitiate the notice. It comes, therefore, to a question of degree. I think this was essentially a notice according to the form prescribed.

BYLES, J.—I am of the same opinion. This notice is properly addressed to the party objected to, by his christian name and surname. The form given in the schedule is,—“I hereby give you notice that I object to *your* name being retained on the list,” &c.: and the notice served is,—“I hereby give you notice that I object to *the* name of Force, Sidney Rice, being retained on the list,” &c., inserting the name instead of the pronoun, and reversing the order in which the christian and surnames appear in the address. It is said that the transposition of the names vitiates the notice. I doubt whether that is so; for, when the form makes use of the pronoun “*your*,” it does not designate the order in which the names are to be read or understood. I must confess I see no necessity for having recourse to the healing efficacy of s. 101: but I agree, that, if there be any difficulty, it is met by that provision.

KEATING, J.—I am entirely of the same opinion. The only possible difficulty which could have arisen would have been from the fact of there being some other person of the same name on the list. But that is negatived by the revising-barrister. If there be any inaccuracy of description, however, it is cured by the 101st section.

Decision affirmed, with costs.

*550]

*YORKSHIRE.—North Riding.

THOMAS GARBUTT, Appellant; THOMAS TUDOR TREVOR.
Respondent. Nov. 23.

A. and others claimed to be entitled to vote in respect of property described in the list as "copyhold houses." Their estates were not in the strict sense of the term "copyholds;" but, from the statement of the case by the revising-barrister, they appeared to have some of the incidents of copyhold tenures, and they were plainly not freeholds, nor were they tenancies from year to year. The revising-barrister found "that the said A. (and the others) was seised in law or equity of houses of copyhold or other tenure not freehold, for his own life or for a larger estate:" and he retained their names on the list. The court affirmed his decision.

At a court held at Gainsborough for the revision of the lists of voters for the north riding of Yorkshire, John Adamson was objected to. His name was thus entered in the list of voters for the township of Hinderwell:—

Name of voter.	Place of abode.	Nature of qualification.	Street, &c., where property situated, &c.
Adamson, John.	Staithes.	Copyhold houses.	Staithes.

The following facts were proved:—The manor of Seaton, in the north riding of Yorkshire, is co-extensive with the township of Hinderwell. The Marquis of Normanby is lord of the manor. The township of Hinderwell contains the village of Hinderwell, the village of Staithes, and the village of Runswick. The inhabitants of all three villages are engaged in fishing or other maritime pursuits. In the village of Hinderwell are freeholders only of the said manor. In Staithes and Runswick all the houses and other tenements (hereinafter for brevity's sake called houses) are held under a customary tenure, hereinafter described, which has there obtained for a long period without alteration. No evidence was produced of any other tenure having at any time existed in Staithes or Runswick.

Between the said houses, and in their immediate neighbourhood, are pieces of ground which are part of the waste of the lord of the manor of Seaton.

Every house in Staithes and Runswick is held by a tenant on the court-roll of the manor of Seaton, who *551] pays a rent in respect of such house to the Marquis of Normanby.

The houses are generally of small value; but a few are of the value of 30*l.* per annum. The rent in each case is a very small or nominal sum, consisting of a few shillings annually, and is always much smaller than the annual letting value of the house. The rents of the various houses differ in amount; but the rent for each house has always continued the same in amount, without alteration.

No notice is given as to when and where the rent is payable: but, by custom, the rent is payable twice a year to the land-agent of the Marquis of Normanby, at the place where and at the time when rent is payable by all tenants of the Marquis of Normanby in the manor of Seaton and elsewhere in the neighbourhood, viz. at a public-house

in Staithes called The White Horse, on the last Wednesday of May and the first Wednesday of December, in each year.

To each tenant of a house in Staithes or Runswick so paying rent, acquittance is given in the following form:—

"No.

"Manor of Seaton.

"Received the 28th day of May, 1863, of X. Y., one shilling and sixpence, for half a year's rent due to the Most Noble the Marquis of Normanby at Lady Day last, by me,	} s. d. 1 6
"Arrear, £—	

"JOHN KERR, agent."

The rent is generally duly paid. One instance only is known of a notice to quit having been served on behalf of the Marquis of Normanby on a tenant in Staines or Runswick: and in that case the tenant did not quit. No action of ejectment has ever been brought against any of the said tenants.

All repairs to any of the said houses are done by the *tenant of the same, and at his expense. And, if any of the said [*552 houses, having become ruinous, is built up, it is built up by the tenant, and at his expense.

Many of the said houses are let by the tenants from week to week or from month to month.

Every tenant is rated to the poor and assessed to the property-tax as owner of the house which he holds.

Tenants of the said houses have occasionally been on the register of parliamentary voters for the north riding of Yorkshire, their qualification being therein described as "copyhold houses" in Staithes or Runswick.

The court of the manor of Seaton is held annually, in October or November. Before holding the court, the steward of the manor issues a precept to the bailiff of the manor, calling upon him to summon a jury to the court about to be holden. The names of the jurors are chosen by the said bailiff and by the land-agent of the Marquis of Normanby out of the freeholders of the manor within the village of Hinderwell, and the tenants of houses in Staithes and Runswick. The steward of the manor presides in the court, and the said land-agent is always present. The list of suitors is called over, and the jury are sworn. After other matters are disposed of, applications from persons desiring to be admitted tenants of houses in Staithes or Runswick are heard.

The person, A. B., desiring to be admitted tenant in the room of the outgoing tenant, C. D., attends at the court, having been generally, but not in every case, summoned for this purpose by the bailiff of the manor. C. D., the outgoing tenant, frequently attends also. A. B. is then presented by the bailiff to the steward, who asks of him (but in no set form of words), "For what purpose do you come?" A. B. then replies (but *without any set form of words), "I seek [*553 to be admitted tenant of house No. 24, in room of C. D.;" adding the circumstance, "I have purchased the house of C. D.," "C. D. is deceased, and has left me the house by will," or "C. D. has died intestate, leaving me his heir-at-law," or as the case may be.

Sometimes the bailiff states the circumstances of the case; sometimes one of the jurors; and sometimes the out-going tenant.

The steward then always inquires of the land-agent if there is any objection to the admission of A. B.; to which the land-agent replies that there is no objection, or that there are arrears of rent due from the out-going tenant, or as the case may be. The foreman of the jury is also generally asked if he knows any objection to the admission of A. B. In most cases, no objection is raised by any one: but occasionally a discussion arises, in which all the circumstances of the case, as well moral as legal, are inquired into; as, for instance, on the application of the heir-at-law to be admitted tenant in the room of his father, who has died intestate, the foreman or one of the jury may say that he, the said heir-at-law, has never done anything for his deceased father or his family, but that E. F., the daughter of the deceased, supported her father during his last illness, and that she is better entitled than A. B. to be admitted tenant.

The steward, after hearing the whole discussion, decides, granting or refusing the application for admission according to his judgment upon all the circumstances, as well moral as legal, of the case.

If A. B. is a purchaser, his application to be admitted tenant is almost always granted; so also if he claims under the will of the deceased tenant: but, in many instances, notwithstanding the devise of the property in question to the applicant has been admitted to *554] have *been in all points of form sufficient and without fraud, his application has been refused by the steward, and another person has been admitted by him as tenant.

If A. B.'s application is granted, the name of C. D., the out-going tenant, is struck out of the court-roll by the pen of the steward, and the name of A. B. is inserted on the court-roll in its alphabetical place among the names of tenants in Staithes or Runswick, as the case may be. A. B. then takes the oath of fealty, and pays to the steward a fee of 1s. 6d. No fee is paid to the lord of the manor.

A change of tenancy of houses in Staithes or Runswick often takes place between the holdings of the manor courts. A. B., the person desiring to be admitted tenant, applies to the said land-agent of the Marquis of Normanby, stating the circumstances of the case. The land-agent usually requires a letter from the foreman of the jury of the manor-court last held, to the effect, that, in the judgment of him the foreman of the jury the said A. B. is best entitled to be admitted tenant of the house in question. The land-agent, at his discretion, gives or refuses to give A. B. a letter to the steward of the manor assenting to A. B.'s application. As a matter of fact, the land-agent usually gives such letter; but he has occasionally refused to give the same, on the ground that the out-going tenant was in arrears of rent. Upon receipt of the letter expressing the assent of the land-agent to the admission of A. B., but in no case without receipt of such letter, the steward of the manor endorses A. B.'s name upon the court-roll for the time being, as in the following form:—

"1862. { Abraham Brown set in tenant for house No. 24, in
Dec. 18. { room of Charles Davies."

For every such admittance out of court, the in-coming tenant pays *555] to the steward a fee of 5s.: but no fine *is paid to the lord of the manor. At the holding of the next manor-court, the name of such in-coming tenant is entered in its proper alphabetical place

in the court roll, among the tenants of Staithes or Runswick, as the case may be.

Every alienation or change of tenancy of any of the said houses in Staithes or Runswick is completed by admission of a new tenant in substitution for or in addition to the former tenant on the court-roll of the manor of Seaton, in the manner and on the conditions hereinbefore described.

Subject to these conditions, if a tenant disposes of his estate in one of the said houses by sale or by pledging, or if he disposes of the same by will, and dies, or if he dies intestate, the vendee, pledgee, devisee, or heir-at-law, as the case may be, is admitted tenant on the court-roll of the manor, and enters upon the possession of the property.

In selling or pledging such estate, no deeds or documents of any kind are used, nor is any copy of the court-roll furnished to the incoming tenant. If a tenant sella, he usually does so by auction; and the auctioneer, as his agent, usually before selling asks of the land-agent of the Marquis of Normanby permission to sell, and in some cases undertakes to pay over part of the purchase-money when received by him to the said land-agent, to meet arrears of rent due from the outgoing tenant. The handbills announcing the sale of a house are usually headed "By permission of the Most Noble the Marquis of Normanby;" and the house is therein described as "the property of" the outgoing tenant. After the sale and purchase, the vendee is admitted tenant in the room of the vendor, either by act in court or out of court, as hereinbefore described.

If the tenant pledges his estate, the person lending the money is, subject to similar conditions, admitted *tenant in his room, or as co-tenant with him. When the money is repaid, the borrower is admitted sole tenant, as before. [556

A tenant disposing of his estate by will describes it as "his interest in groundage property," in Staithes or Runswick, or "his groundage property," or "his groundage," or "his frontage." On his death, the person named in the will is, subject to conditions hereinbefore described, admitted as tenant.

If a tenant, being a feme sole, married, the husband is admitted co-tenant with her, or tenant in her room.

No instance is known of a tenant becoming bankrupt or insolvent, and his assignees being admitted tenants in his room.

In a very few cases, one of the overseers of the poor of the township of Hinderwell has been admitted tenant on the court-roll in room of a tenant who has become chargeable as a pauper to the said township; and, on the pauper tenant dying intestate, the overseer has continued on the court-roll, notwithstanding the application of the heir-at-law of the deceased to be admitted tenant.

Herein follows an extract from the court-roll of the manor of Seaton, for the year 1862, which was proved to correspond in form with all the previous court-rolls of the said manor within memory:—

"Manor of Seaton, } The court-leet with view of frankpledge and
to wit. } court-baron of the Most Noble Constantine
Henry, Marquis of Normanby, lord of the said
manor, held at the house of Johnson Ridley, situate at Staithes,
within the said manor, on Thursday, the 4th day of December, 1862,

before John Buchanan, gentleman, steward, and the suitors of the said court:

*557] "The names of the jurors of the said court sworn to *inquire into and present as well for our sovereign lady the Queen as the lord of the said manor. [Then follow the name of the foreman of the jury, the names of the twelve other jurors, and the name of the sworn pinder.]

No.	Name.	Description of property.	
	<i>Freeholders, owners of lands and tenements within the said manor of Runswick.</i> <i>Tenants and residents.</i> <i>Hinderwell freeholders.</i> Adamson, Luke. Broderick, Andrew. [Here follow other names, but without description of property added.] <i>Staithes.</i> <i>Tenants and residents.</i>		
46	Adamson, Elisha.	Dwelling-house.	
88	Abram, Thomas and Francois.	Dwelling-house.	
51	Beswick, George.	Dwelling-house.	
87	Brown, William.	Dwelling-house.	
	[Here follow other names in alphabetical order, with description of property.]		

On behalf of the said John Adamson, it was proved that the clear yearly value of the houses in respect of which he claimed to vote amounted to 10*l.*; that he had been admitted tenant of the said houses, and his name inscribed as such tenant in the court-roll of the manor of Seaton, in the manner hereinbefore described; and that he had thereupon entered into actual possession of the said houses, and had ever since continued in actual possession of the said houses or in receipt of the rents and profits of the same, his name also being continued as such tenant as aforesaid in the successive annual court-rolls of the manor. It was admitted that *he had during his tenancy *558] regularly paid to the land-agent of the Marquis of Normanby a fixed rent in respect of the said houses, and had received receipts for the same, as hereinbefore described.

A person claiming to vote for the county in respect of copyhold houses in Staithes or Runswick would there be commonly understood as claiming to vote in respect of houses held in the manner hereinbefore described.

On behalf of the objector, it was contended that the voter was a mere tenant at will of the lord of the manor, and that he was not seised at law or in equity of houses of copyhold or any other tenure whatever for his own life or for any larger estate.

The revising-barrister held that the said John Adamson was seised in law or equity of houses of copyhold or other tenure not freehold, for his own life or for a larger estate: and he accordingly allowed his name to stand on the list of voters, subject to the opinion of the court.

The claims of seventeen other persons whose names and qualifications were, together with the name and qualification of the said John Adamson, set out in a schedule annexed to the case, depended on the like facts and findings, and were decided by the revising-barrister in the same manner and on the same point of law as the case of John Adamson. The revising-barrister accordingly allowed the said seventeen names to stand on the list, subject to the opinion of the court. And he ordered the appeals to be consolidated.

If the court should be of opinion, that, in the circumstances above stated, John Adamson was not seised at law or in equity of houses of copyhold or any other tenure whatever except freehold for his own life or for any larger estate, the eighteen names contained *in the schedule annexed to the case were to be struck out of the [*559 list of voters for the township of Hinderwell; otherwise, the said names were to be retained.

Thomas E. Chitty, for the appellant.—This is a claim to be registered under the 19th section of the Reform Act, which enacts that “every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any lands or tenements of copyhold or any other tenure whatever except freehold, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote,” &c. Under that section, the party is not entitled to vote unless he holds by copy of court-roll: a record of the title is required. These parties do not hold by copy of court-roll: the revising-barrister has evidently mistaken the suitors’ roll of the court-leet or court-baron for the customary court-roll. The tenure in question wants all the essential attributes of a copyhold estate. The respondents are in truth mere squatters. To be a copyholder, the party must hold by copy of court-roll: Co. Copyh. 14, 66, 99; 12 Car. 2, c. 24, ss. 1, 5; Litt. §§ 73, 78; Fitz. Nat. Brev. 12 C.; 1 Wms. Saund. 349 (*h*); Watk. Cop. 40 (4th edit. 57); Vin. Abr. *Copyhold* (O); 1 Cruise Dig. 266; Kitchen on Courts 168; 2 Stark. Evid. 4th edit. 332; Sugden’s Vendors, 14th edit. 432. In 1 Stephen’s Commentaries, 4th edit. 623, it is said: In some manors, where the custom hath been to permit the heir to succeed the ancestor, the estates are called copyholds of inheritance; in other, where the lords have been more vigilant to maintain their rights, they remain copyholds for life or years only; but, though the interest of the copyholder may be *thus in fee or for life, and consequently may partake of the [*560 nature of freehold, in respect of the *quantity of the estate*, it is, nevertheless, for want of the remaining ingredient, viz., that of free tenure, no *freehold*. Indeed, in every case of copyhold, the law still distinguishes between the strictly legal and the customary estate; for, as regards the former, it supposes the seisin and freehold of the land to be vested in the lord (of whose demesnes it is properly parcel), and the copyholder to be mere tenant at will: but, as he is tenant at will according to the custom, that is, to hold in fee, or for life, or years (as the case may be), it considers him as having a customary estate to that extent, and one that is fixed and permanent in its nature, such as it is out of the power of the lord to defeat or encroach upon. In

consonance with the latter view, which assigns to the copyholder the character of a permanent tenant, he is deemed to owe fealty to his lord, which is an obligation from which a mere tenant at will is always exempt." The estates in question clearly do not fall within that definition. Neither are they ancient demesne or burgage tenements, as in *Passingham, app., Pitty, resp.*, 17 C. B. 299 (E. C. L. R. vol. 84). These estates have none of the incidents of copyhold tenures: nothing is said in the case about surrender, admittance, fealty, fines, escheats, forfeitures, heriots, or rights of common. The only fact which is stated that shows a shadow of title, is, that these parties pay a rent, and take an ordinary acquittance,—evidently for the purpose of preventing the operation of the statute of limitations. It would be extremely dangerous to hold that such a vague and undefined tenure confers the franchise.

Mellish, Q. C., for the respondent.—The facts disclose a somewhat extraordinary sort of tenure; but the substantial question is, whether *561] these parties are tenants *for life or tenants at will only. It is not necessary to make out that they are customary copyholders. Though rare at the present day, no doubt, still there are such things as copyholds for life. The general rule is stated in *Scriven on Copyhold*, 4th edit. 43,—“A copyholder has, in judgment of law, but an estate at will, yet by custom copyhold tenements may be descendible.” At p. 22, it is said: “A custom, that, after the death of a tenant for life, the lord is compellable to grant to a particular person, as, to the son, and, if no son, to the daughter, and so in perpetuum, is void, though a custom for a copyholder for life to nominate his successor is good, the former being to compel the lord, who has the interest, to make a grant of it, and the latter compelling an admittance where the interest is in the copyholder. But, under such a custom, the estate could not be divided into fractions by nominating part to one and part to another; yet it should seem that by the custom of *Yelminster Prima*, in *Devonshire*, the person nominating may except any part of the lands to any other person, but such exception operates on the beneficial interest only, the nominee continuing tenant to the lord for the whole.” At p. 125, it is said: “In strictness, copyholds for lives are not the subject of surrender, other than as a mode of extinguishing the copyholder's interest, except by special custom, for it should seem that a copyholder for life cannot of common right surrender to the use of another for the remainder of his own life; and all the authorities agree, that, under the ordinary surrender by a copyholder for life, and the re-grant by the lord to the purchaser or his nominee, the grantee is in by the lord, and not by the surrenderor.” The facts found here are totally inconsistent with an ordinary tenancy at will. The houses are said to be held under a customary tenure; and every house is held by a tenant *562] *on the court-roll of the manor. The rent is small as compared with the annual value, and is never varied. It is payable twice a year. The tenants are not subject to notice to quit or to actions of ejectment,—from which it is to be inferred that there is no compulsory change of tenancy. The tenants are rated to the poor, and assessed to the property-tax as owners. [WILLIAMS, J.—If these were tenancies at will, the estate of the tenant would determine

on the death of the lord : and yet no trace is to be found of any such termination of a holding.] None. All these circumstances are equally inconsistent with a tenancy from year to year. These tenants are summoned on the manor jury, which would not be the case if they were mere tenants at will or tenants from year to year. It may be that the absence of surrender shows that these are not copyholds of inheritance. Again, Serjt. Scriven, at p. 361, says: "Fealty, which is incident to every tenure except tenants in frankalmoigne and tenants at will, signifies the oath which was administered to every tenant upon his admittance, to become a faithful tenant to the lord, and to do suit at his courts, &c., and is an imitation of the homage required by every lord, and rigidly enforced during the existence of the military tenures." And in a note it is said,—“But, in 10 H. 6, the justices of the Court of Common Pleas held that lessees for years could not do fealty: Co. Copyh., § 21: and see Kitch. 260.” So that fealty seems to be a distinctive mark of a tenancy for life. [He was stopped by the court.]

Chitty, in reply.—If a customary tenure at all, this must be a customary freehold. If so, these parties can have no right to vote under s. 19. The 12 Car. 2, c. 24, having destroyed all base tenures, except tenures by copy of court-roll, these persons, if they have any [*563 *estate at all beyond a tenancy at will, must be freeholders.

ERLE, C. J.—I am of opinion that the decision of the revising-barrister was right. Upon the evidence which was before him, I should have come to the same conclusion: not that I am able to see very clearly what is the precise nature of the interest in respect of which these persons claimed to vote; but it seems to be an interest of a permanent nature according to the custom, and amounting at least to an estate for life. Is it a freehold interest? I find here none of the incidents which usually attach to a freehold. The parties hold without being liable to be turned out by a notice to quit, or to an ejectment. Their interest cannot be less than a tenancy for life. The parties holding under this manor appear to have held in the same way for generations. I believe, if the history of the law of these tenures were looked into, it would be found that all copyholders were originally tenants at will, and that by process of time their interests have gradually grown into definite estates such as we now find them, governed in some respects by the particular customs of the manor to which they belong. As to the manor which we are now dealing with, it seems there are customs which are found exemplified in the case of many other manors in the north of England. Upon the facts found by the revising-barrister here, I am of opinion that these persons have a permanent interest in the land, which at the lowest amounts to an estate for life, and that it is not a freehold. Then the 19th section of the 2 W. 4, c. 45, says that every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any lands or tenements of copyhold or any other tenure whatever except freehold, for his own life, &c., of the clear yearly value, [*564 of not less than 10*l*. over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote. These parties have estates for their lives, which are not of freehold tenure, and which are of the requisite value. They are, therefore

clearly entitled to be registered. The decision of the revising-barrister must be affirmed with costs.

WILLIAMS, J.—I am of the same opinion. A great deal of learning is to be found with respect to these curious tenures in many books of authority, beginning with Hargreave and Butler's learned note to Co. Litt. 59 b, and coming down to the more recent cases of Doe d. Edmunds v. Llewellyn, 2 C. M. & R. 503, and Passingham, app., Pitty, resp., 17 C. B. 299 (E. C. L. R. vol. 84). They are very common in the north of England, where they are sometimes called customary freeholds and sometimes tenant-rights. The contest on the present occasion has been whether the estates held by these persons are freehold or copyhold interests. But I apprehend it is quite immaterial here whether they are freehold or copyhold; because, if they are not freeholds, but are in the nature of copyholds, being respectively above the value of 10*l.* a year, they are within the words of the 2 W. 4, c. 45, s. 19. The only question is, whether the revising-barrister was right in holding that these persons are seised in law or equity of houses of copyhold or other tenure, for their own lives, or for a larger estate. Although the circumstances which he has detailed are not easily reconcilable with any tenure known to the law, but point to a sort of interest which may perhaps be referred to an enjoyment such as encroachers would have arrived at, yet such an anomalous state of things may have arisen from the fact of the lord, dealing with people who were unable to resist him, having chosen to impose

*565] conditions which the law did not warrant. Notwithstanding this, here is a case of customary freehold or some estate of that kind continuing at least for the life of the party. The revising-barrister having come to this conclusion, I cannot see that we are warranted in saying he has done wrong. He has found the facts; and I think upon the evidence before him he was fully warranted in his decision.

BYLES, J.—I am of the same opinion. Upon the facts here found, I must own I should have thought that the freehold was in the lord. These parties cannot be considered as mere squatters; neither are they tenants from year to year: they are tenants for life, at the least. We cannot disaffirm the decision of the revising-barrister unless we see clearly that the qualifications of these persons cannot be copyhold tenements. It is extremely difficult to say precisely what sort of interest the respondents have. The revising-barrister holds that each of them was "seised in law or equity of houses of copyhold or other tenure not freehold, for his own life or for a larger estate." He has found the facts which induced him to come to that conclusion; and I cannot say that they do not warrant it.

KEATING, J.—I am of the same opinion. The tenure of the land by the respondent and the other persons whose cases are consolidated with his is one of a very peculiar character. From the facts which are found, I cannot discover that the conclusion is otherwise than right. The argument of Mr. Chitty is not quite consistent with the facts found. The statement is wholly inconsistent with a freehold interest in these persons: and it is equally so with a tenancy from year to year; for, who ever heard of fealty being required of a tenant from year to year? It is not easy

*566] to define the precise character of the tenure. But, if it is not a copyhold, I should say that

it is so near to a tenure of that description as to come within the 19th section of the Reform Act. Decision affirmed, with costs.

END OF THE REGISTRATION CASES.

*IN THE EXCHEQUER CHAMBER. [*567

MICHAELMAS VACATION, 1863.

GORE *v.* The RIGHT HON. SIR GEORGE GREY, Bart. and Others. Nov. 30.

Judgment of the Common Pleas affirmed.

THIS was an action for an assault and false imprisonment. The defendants—the Home Secretary, the keeper of the Queen's Prison, the deputy-keeper, a turnkey, the surgeon of the prison, and one of the physicians of St. Thomas's Hospital,—justified under the 14th section of the Queen's Prison Act then in force (5 Vict. c. 22), on the ground that the plaintiff was insane.

The Court of Common Pleas, upon the argument of a demurrer to the pleas, held, that, although the 102d section of the Insolvent Debtors Act, 1 & 2 Vict. c. 110, was virtually repealed by the 14th section of the Queen's Prison Act, because the former enactment was utterly inconsistent with the latter, yet the 14th section of the Queen's Prison Act, on which the pleas of justification were founded, was not repealed or affected by the 4th section of the Lunacy Act, 16 & 17 Vict. c. 96, by reason of the saving clause which is inserted into it: see the report, 13 C. B. N. S. 138 (E. C. L. R. vol. 106).

The plaintiff brought a writ of error, which came on for argument before Pollock, C. B., Bramwell, B., Channell, B., Blackburn, J., Mellor, J., and Pigott, B.

The plaintiff was heard in person: but *The Solicitor-General* (with whom was *Welsby*) was not called upon.

THE COURT unanimously affirmed the judgment of the court below. Judgment affirmed.

*PARRY *v.* THE CROYDON COMMERCIAL GAS AND COKE COMPANY. Nov. 30. [*568

By the Croydon Improvement Act, 10 G. 4, c. lxxiii, s. 27, it is enacted, that, if the commissioners, or any company or other person making or supplying gas within the limits of the act, shall suffer any impure matter to flow into any stream, &c., they shall be liable to a penalty of 200*l.*, to be sued for by any common informer, and to a further penalty of 20*l.* a day for the continuance of the nuisance after notice, to be paid to the informer or the party injured, as the justices should think fit.

By the 21st section of the Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 21, a like penalty is imposed upon the undertakers of any gasworks for the same offence, which penalty is, by s. 22,

"to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act;" and by s. 23, a daily penalty of 20l. is imposed on them for the continuance of the nuisance after notice, to be recovered in like manner:—

Held, that a gas-company established under an act of parliament in which the provisions of the Gasworks Clauses Act are incorporated, are liable to the penalties imposed by the 10 Vict. c. 15, but not to those imposed by the 10 G. 4, c. lxxiii.

THIS was an action by a common informer against The Croydon Commercial Gas and Coke Company, upon the 10 G. 4, c. lxxiii. (the Croydon Lighting and Improvement Act), for permitting offensive matter to flow into certain streams.

The declaration stated that the defendants, within six calendar months before the commencement of this suit, to wit, on the 2d of August, 1861, they then being persons making, furnishing, and supplying gas used and burnt for lighting divers highways, streets, and places, houses, manufactories, and other premises within the limits of an act made in the 10th year of the reign of King George the Fourth, intituled "An act for lighting, watching, and improving the town of Croydon in the county of Surrey, for providing lodgings for the judges at the assizes holden in the said town, and for other purposes relating thereto," did drain and convey, and caused and suffered to be drained and conveyed and to run and flow, divers washings and other waste liquids, substances, and things which arose and were made in the prosecution of the said gasworks, into certain rivers, brooks, and running streams, canals, reservoirs, aqueducts, feeders, ponds, and spring-heads, and into divers drains, sewers, and ditches communicating with them the said rivers, &c., and did and caused to be done *569] divers annoyances, acts, and things to the water contained in them; whereby the water contained in them, and divers parts thereof, were spoiled, fouled, and corrupted, contrary to the form of the statute in such case made; whereby and by force of the said statute the defendants forfeited and became liable to pay to the plaintiff the sum of 200l.: yet the defendants had not paid the same: and the plaintiff claimed 200l.

Second plea, that the acts and things complained of, and each and every of them, were and was committed and happened after the passing and coming into operation of "The Croydon Commercial Gas and Coke Act" (10 & 11 Vict. c. cxxiv.), and after the 1st day of August, 1849; and that the said acts and things, and each and every of them, were and are and was and is such and the like acts and things, act and thing, as are and is described and mentioned in the 21st section of "The Gasworks Clauses Act, 1847" (10 Vict. c. 15) and no other; and that the plaintiff is not and never has been the person into whose water the washing or other substance produced in making or supplying gas in such act mentioned (being the washings and other waste liquids, substances, and things in the declaration mentioned) were conveyed or flowed, or the person whose water was fouled.

To this plea the plaintiff demurred, the ground of demurrer being, "that the plaintiff's right to sue for the penalty given by the 10 G. 4, c. lxxiii., s. 27, is not taken away by the 10 & 11 Vict. c. cxxiv., incorporating the 10 Vict. c. 15, s. 21, and that the two penalties are cumulative." *Tolander.*

The Court of Common Pleas having given judgment for the

defendants upon this demurrer (11 C. B. N. S. 579 (E. C. L. R. vol. 103), the plaintiff brought a writ of error, which was argued in the Exchequer Chamber, before Pollock, *C. B., Bramwell, B., [570 Channell, B., Blackburn, J., and Pigott, B.

Joyce, for the plaintiff in error.—By the 10 G. 4, c. lxxiii., certain commissioners are appointed to carry into effect the lighting and improving the town of Croydon: and by s. 27 of that act it is enacted that, “if the said commissioners, or any company or companies, or any other person or persons whatsoever, making, furnishing, or supplying any gas used or burnt for lighting any highway, &c., or any house, &c., within the limits of this act, shall at any time drain or convey, or cause or suffer to be drained or conveyed, or to run or flow, any washings or other waste liquids, substances, or things whatsoever which shall arise or be made in the prosecution of the said gasworks, into any river, brook, or running stream, canal, reservoir, aqueduct, feeder, pond, or spring-head, or into any drain, sewer, or ditch communicating with any of them, or do or cause to be done any annoyance, act, or thing to the water contained in any of them, whereby the water contained therein, or any part thereof, shall or may be spoiled, fouled, or corrupted, then and in every such case the said commissioners, or any such company or companies, or other person or persons as aforesaid; shall forfeit and pay for every such offence *the sum of 200l.*,” to be recovered by action, &c., and paid to *the person or persons who shall inform or sue for the same*; and that section also imposes a further penalty of 20l. for each day the nuisance shall be continued,—such last-mentioned penalty to be paid “to the informer or to the person or persons who in the judgment of the justice or justices before whom the conviction shall take place shall have sustained any annoyance, injury, or damage by any such act so done or committed.” The defendants *are a company incorporated by the 10 & 11 Vict. c. cxxiv. [571 for supplying Croydon and its vicinity with gas. The 1st and 4th sections of that act respectively incorporate therewith The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), The Gasworks Clauses Act, 1847 (10 Vict. c. 15), and the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). The 21st section of the 10 Vict. c. 15 enacts, that, “if the undertakers shall at any time cause or suffer to be brought or to flow into any stream, reservoir, or aqueduct, pond, or place for water, or into any drain communicating therewith, any washing or other substance produced in making or supplying gas, or shall wilfully do any act connected with the making or supplying of gas, whereby the water in any such stream, reservoir, aqueduct, pond, or place for water shall be fouled, the undertakers shall forfeit for every such offence *the sum of 200l.*” And the 22d section enacts that “the said penalty of 200l. shall be recovered, with full costs of suit, in any of the superior courts, *by the person into whose water such washing or other substance shall be conveyed or shall flow, or whose water shall be fouled by any such act as aforesaid*: but such penalty shall not be recoverable unless it be sued for during the continuance of the offence, or within six months after it shall have ceased.” The question is, whether this is a substitution for the penalty imposed by the former act, or a cumulative penalty. The plaintiff submits that it

is cumulative. In *Goldson v. Buck*, 15 East 372, it was held that an act passed in the 14 G. 2 (c. 43), enabling T. S., the lord of the manor of F., his heirs and assigns, at their costs, to convey water in pipes from his estate there to Portsmouth, and through the streets, and for that purpose to break up the pavement, making good the same again, was not repealed by the 32 G. 3, c. 103 (passed above fifty years *572] *afterwards), vesting the property and control of the pavement in commissioners, without exception of the former right,—the two acts not being inconsistent, but giving the several powers to be exercised for different purposes. So, here, it is submitted these two penalty clauses are not inconsistent, and may very well subsist together. The 29th section of the Gasworks Clauses Act enacts that “nothing in this or the special act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to *any other legal proceeding to which they may be liable* in consequence of making or supplying gas.” The two acts were passed with totally different objects: under the first act, any person may sue for the penalty; but, under the 10 Vict. c. 15, the action must be brought by the person whose water is fouled. [MELLOR, J.—The one act is confined to offences by the undertakers; the other extends to offences committed by any one.]

Sir George Honyman, contra.—The judgment of the court below is correct. [POLLOCK, C. B.—The question is, whether we are to hold that the legislature meant to impose two penalties of 200*l.* each for the same offence, or merely by the later act to define the person by whom the penalty is to be recovered. The course of modern legislature has been to put down the *qui tam*.] The object of the Gasworks Clauses Act was, to provide one uniform code of regulations for all works of this kind. This appears from the preamble. The general heading which precedes s. 21 also clearly shows what was the intention of the legislature,—“And with respect to the provision for guarding against fouling water, or other nuisance from the gas, be it enacted as follows:” and then the 21st section proceeds to impose upon the undertakers precisely the same penalty for the same acts as were prohibited by *the 10 G. 4, c. lxxiii., and the 22d section to make *573] *that penalty* recoverable by action at the suit of the party aggrieved, instead of, as under the former act, at the suit of a common informer: and the 23d section,—as if to make the intention of the legislature yet more clear,—enacts, that, “in addition to the said penalty of 200*l.* (and whether such penalty shall have been recovered or not), the undertakers shall forfeit the sum of 20*l.* (to be recovered in like manner) for each day during which such washing or other substance shall be brought or shall flow as aforesaid, or the act by which such water shall be fouled shall continue, after the expiration of twenty-four hours from the time when notice of the offence shall have been served on the undertakers by the person into whose water such washing or other substance shall be brought or shall flow, or whose water shall be fouled thereby; and such penalty shall be paid to such last-mentioned person.” [MELLOR, J.—The daily penalty under the 10 G. 4, c. lxxiii. s. 27, is to go either to the informer or to the party grieved, at the option of the justices.] The declared object of the legislature being to insure “greater uniformity in the provi-

sions" in acts of parliament for the construction of gasworks and the supplying of gas, is it reasonable to suppose that they intended that in this district there should be two penalties for the same offence, one recoverable by the informer and the other by the party aggrieved? [BLACKBURN, J.—The Gasworks Clauses Act does not take away the right to recover compensation in damages.] No. It is the same as if the legislature had said, that, if gas companies do the things mentioned, they shall be liable to the penalties in the 10 G. 4, c. lxxiii., s. 27. It may be that any other persons doing these acts would still be liable under the 10 G. 4, c. lxxiii.; but gas companies are only liable to be sued under the 10 Vict. c. *15; s. 22. If the argument on the other side be correct, the party aggrieved [*574 might get 40l. a day. In *The Great Central Gas Consumers Company v. Clarke*, 11 C. B. N. S. 814 (E. C. L. R. vol. 103) (affirmed on error, 13 C. B. N. S. 838 (E. C. L. R. vol. 106), it was held that the general act for regulating the supply of gas to the metropolis (23 & 24 Vict. c. 125) repealed the provisions of all local gas acts as to the rate of charge. [BLACKBURN, J.—The words there showed an intention in the legislature so to do.] In the course of his judgment in the court below, Willes, J., says (11 C. B. N. S. 835),—"I do not assent to the proposition quoted from Dwarris on Statutes (p. 604), that, in order to effect a repeal of a former act, the later or repealing act must contain express words. If that be the proposition which that learned author means to lay down, it clearly is not accurate. It is enough if there be words which by necessary implication repeal it." In *The King v. The Trustees of the Northleach and Whitney Roads*, 5 B. & Ad. 978 (E. C. L. R. vol. 27), a local turnpike act (24 G. 2, c. 28) directed that the trustees should keep books, in which they should enter their accounts and also their orders and proceedings, and that *all persons* should have access to such entries: by a subsequent local act (1 & 2 G. 4, c. cix.), it was directed that the trustees should keep a book in which they should enter their accounts, which book should be open to the inspection of *the trustees* or of *any creditor on the tolls*. The General Turnpike Act, 5 G. 4, c. 126, s. 73, re-enacted the latter provision as to all turnpike-road accounts, and s. 72 directed that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of *any of the trustees*, and should be read as evidence in courts, as there directed. That act also provided that the enactments therein contained should extend to all other turnpike acts, except where by that act it was *otherwise ordered. It was held that these clauses of the general and of the second local act superseded the provisions [*575 of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees and creditors in the respective cases of orders and accounts. That case, it is submitted, is precisely in point.

Joyce, in reply.—The 10 G. 4, c. lxxiii., is unrepealed. It must be assumed that the legislature knew of the existence of that act: and yet they chose to give by the 10 & 11 Vict. c. cxxiv., powers to these defendants, subject to a summary remedy reserved to parties who might be injured by the mode of conducting their works. The 29th section of the 10 Vict. c. 15, is strong to show that the legislature did

not mean to exonerate the company in respect of any liability under the local act.

POLLOCK, C. B.—All the members of the court who are now present are unanimously of opinion that the judgment of the Court of Common Pleas is right, and must be affirmed. My Brother Blackburn, who has been obliged to go to Chambers, entertained some doubt; but he desired me to say that he is not disposed to dissent from the view taken by the rest of the court. It appears to me, that, in construing a penal statute of any kind, we are bound to take care that the party is brought strictly within it, and to give no effect to it beyond what it is clear that the legislature intended. If there be any fair and legitimate doubt, the subject is not to be burthened. Though, no doubt, in modern times, the old distinction between penal and other statutes has in this respect been discountenanced, still I take it to be a clear rule of construction at the present day, that, in the imposition *576] of a tax or a duty, and still more of a penalty, if there be any fair and reasonable doubt, we are so to construe the statute as to give the party sought to be charged the benefit of the doubt. More might have been urged here in favour of the plaintiff, if the original clause and the subsequent one had been framed in such a way as to show that the legislature intended to make the penalty a substitution for the common-law remedy. But the general statute imposes precisely the same penalty as that which was imposed by the local act, and does not say, as is sometimes said, that the new penalty shall be in addition to the penalty already imposed. It does not pretend to be either a substitution of the right of action, or a cumulative penalty. Upon these grounds, it seems to me that the evident intention of the legislature was, not to make the party liable to a double penalty, but merely to substitute the person aggrieved as the person to sue, for the common informer.

BRAMWELL, B.—I am of the same opinion. The defendants had no existence until the passing of the 10 & 11 Vict. c. cxxiv., which regulates and defines their rights and liabilities. That act may and ought to be read in connection with the Gasworks Clauses Act, 10 Vict. c. 15, which was passed for the purpose of consolidating in one act certain provisions usually contained in acts authorizing the making of gasworks for supplying towns with gas, and for insuring greater uniformity in the provisions themselves. The penalty clauses are introduced with this recital,—“And with respect to the provision for guarding against fouling water, or other nuisance from gas, be it enacted as follows.” The 21st section then enacts, that, “if the undertakers,”—that is, the persons by the special act authorized to construct *577] the gasworks,—“shall at any time cause or suffer to be brought or to flow into any stream, reservoir, or aqueduct, pond, or place for water, or into any drain communicating therewith, any washing or other substance produced in making or supplying gas, or shall wilfully do any act connected with the making or supplying of gas whereby the water in any such stream, reservoir, aqueduct, pond, or place for water shall be fouled, the undertakers shall forfeit for every such offence the sum of 200*l*.” That is the consequence which is to ensue upon that act being done. The 22d section then goes on to provide how the penalty is to be recovered, and who shall

sue for it. It enacts that "the said penalty of 200*l.* shall be recovered, with full costs of suit, in any of the superior courts, *by the person into whose water such washing or other substance shall be conveyed, or shall flow, or whose water shall be fouled by any such act as aforesaid;* but such penalty shall not be recoverable unless it be sued for during the continuance of the offence, or within six months after it shall have ceased." But it is said, that besides this, another consequence is to attach to the commission of the prohibited act, because another act of parliament relating to the watching, lighting, and improving of the town of Croydon (10 G. 4, c. lxxiii.), in s. 27 enacts that any company or other person making or supplying gas within the limits of the act, who shall suffer any impure matter to flow into any stream, &c. (precisely the offence for which by the 10 Vict. c. 15 the undertakers are to pay the same penalty), should be liable to a penalty of 200*l.* So that, according to the plaintiff's contention, this company is to be liable to a double penalty. It seems to me, however, that that was not the meaning of the legislature; but that, in the absence of any clear enactment to the contrary, the defendants could only incur one penalty of 200*l.*, to be recovered in the *manner pointed out by the 10 Vict. c. 15, s. 22. I do not think it necessary to hold that the [*578. 10 G. 4, c. lxxiii., is abrogated. On the contrary, I do not think it is. Any person now setting up gasworks in the town of Croydon might be liable to the penalty under the local act. Why should one set of offenders be liable to one penalty and another set to another and different penalty for the same offence? Further, as was put by Williams, J., in the court below, the Gasworks Clauses Act imposes a further penalty of 20*l.* a day, to be recovered by the party injured, for each day that the nuisance shall be continued after notice: and the local act imposed a like daily penalty for the like offence, to be paid, at the option of the justices, either to the informer or to the person injured. Is it to be said that a cumulative penalty of 20*l.* per day is given to the person injured? I think it is impossible to say that. It must be conceded that the 20*l.* penalty under the local act is gone as to this company. That is clear almost to demonstration: and, if the 20*l.* penalty is gone, the 200*l.* penalty must be gone also. With all respect for the doubt intimated by my Brother Blackburn, I think the judgment of the Court of Common Pleas was quite right, and should be affirmed.

CHANNELL, B.—I must own that I have felt disposed to participate in the doubt entertained by my Brother Blackburn: but, upon the whole, I agree that the judgment of the court below should be affirmed. The question is, whether the second plea is an answer to the declaration. It appeared to me at first to be necessary for the defendants to show that the Croydon Improvement Act, 10 G. 4, c. lxxiii., was repealed by the 10 Vict. c. 15, ss. 21, 22, as to this penalty. But the argument of their learned counsel has convinced [*579. me that it is not necessary to go that length. It is unnecessary to consider whether an action at common law could be maintained against the defendants for an injury of this description, or whether the party injured is limited to the penalty provided by the Gasworks Clauses Act. The defendants here are sued in their corporate character under the special act 10 & 11 Vict. c. cxxiv.: and they

are sued for a penalty created by the local act of 10 G. 4, c. lxxiii. I am clearly of opinion that this plea is an answer to that action. I cannot understand how, as a corporation, they can be liable to penalties under the local act.

MELLOR, J.—I must confess that I also entertained some doubt: but I am satisfied by the reasoning of my Brothers Bramwell and Channell. I am satisfied that the penalty to which these defendants are liable is not given to the common informer. As regards other persons, the local act may still have force. But, as to these defendants, the true effect of the special act and the Gasworks Clauses Act, is, to enable them to erect gasworks and to do all things necessary for supplying the town and neighbourhood with gas, subject to certain conditions, one of which is, that, if they foul any stream, &c., they shall be subject to the penalties provided by the general act. I do not feel called upon to offer any opinion as to whether or not those penalties are the only reparation for the fouling which the party injured is entitled to sue for.

PIGOTT, B.—I am of the same opinion. If the persons mentioned in the 10 G. 4, c. lxxiii., s. 27, do the acts enumerated in that section, they may still be liable to the penalties imposed by that statute, if *580] they have not statutory powers. But the present defendants *are an incorporated company having statutory powers to do what they have done, subject to certain penalties if any injury is thereby caused to any individual: they are to erect gasworks, &c., subject to the provisions in the special act and in the Gasworks Clauses Act contained. The penalties in ss. 21 and 23 are, with reference to persons acting under those acts, given in substitution of the penalties contained in the local act. Judgment affirmed.

TWENTY-SEVENTH YEAR OF THE REIGN OF VICTORIA. 1864.

The Judges who usually sat in banco in this Term, were,—
 ERLE, C. J., WILLES, J.,
 WILLIAMS, J., KEATING, J.

THE Hon. Mr. Justice Wightman, one of the Judges of the Court of Queen's Bench, died at York, on the 10th of December, 1863, after a few hours' illness, in his 80th year.

William Shee, Esq., Q. S., who was appointed a Judge of the Court of Queen's Bench in the room of the late Mr. Justice Wightman, took the oaths in Court on the 2d day of this Term.

The learned Judge shortly afterwards received the honour of knight-hood.

On the 13th of January, 1854, Mr. Serjt. Ballantine received a Patent of Precedence, to take rank next after Powell, Q. C.

*582] ***ALDRIDGE v. THE GREAT WESTERN RAILWAY COMPANY.** *Jan. 20.*

Any condition limiting the liability of a railway company as carriers must be a condition just and reasonable in the judgment of the court, and must be set out in a written (or printed) contract signed by or on behalf of the consignor of the goods.

Certain packages called "empties" were delivered to a railway company to be carried to a place beyond their line, the person by whom they were delivered signing on the consignor's behalf a printed note containing the following among other conditions:—

"1. The company will not be answerable for the loss or detention of, or damage to, wrappers or packages of any description charged by the company as 'empties.'

"2. Nor in respect of goods destined for places beyond the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier.

"3. The company will not be liable for any loss or injury to articles, except on proof that such loss or injury was occasioned by the neglect or default of the company or its servants."

The goods were carried duly to Gloucester, where the defendants' line ended, and were there handed over to the Midland Railway Company in further prosecution of the transit, after which the detention and damage of which the plaintiff complained took place:—

Held, that the second of the above conditions discharged the defendants from liability in respect of the damage and detention complained of.

Held, also, that a signature of the special contract by a "railway agent" employed by the consignor to deliver and by the company to receive the goods for them, is a sufficient signature to satisfy the 7th section of the Railway Traffic Act, 1854.

Seem, that the company were not to be considered as mere gratuitous bailees because the "empties" are carried free of charge,—the contract for payment for the same packages when forwarded full, including a contract or engagement on their part to make no additional charge for returning them when empty.

THIS was an action against the Great Western Railway Company, as carriers, for the loss of certain tubs, packages, and baskets of the plaintiff which had been delivered to them to be carried "for reward," as the declaration alleged, for the plaintiff, from Hereford to Tiverton, but which were lost through the defendants' negligence.

The defendants pleaded—first, not guilty,—secondly,—that the goods were not delivered to them to be carried on the terms in the declaration mentioned,—thirdly, as to the loss and detention, a special contract in writing under the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, signed by the person delivering the goods, and containing a just and reasonable condition, viz. that the defendants should not be liable for any loss or detention of or damage to goods *583] *destined for any place beyond the limits of the defendants' railway, after they should have been delivered by the defendants to another railway; that the goods in question were destined for a place beyond the limits of the defendants' railway; and that the loss and detention occurred after they had been delivered over to another carrier. Upon these pleas the plaintiff joined issue.

The cause was tried before Byles, J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were as follows:—The plaintiff is a fruit-dealer at Tiverton, and had sent the tubs and baskets in question full of fruit from that place to Hereford by railway. When the contents were disposed of, the tubs and baskets were collected by certain persons named R. T. Smith & Co., and by them brought to the Great Western railway station at Hereford, directed to the plaintiff at Tiverton. Nothing was paid or

agreed to be paid for the carriage of them,—it being the practice of railway companies to carry “empties” (packages which have passed over their lines full, and are on their way back to be used again) free of charge. On delivering the packages to the company at Hereford, Messrs. Smith & Co. signed a printed note containing the following “conditions:”—

“1. The company will not be answerable for the loss or detention of, or for damages to, any goods, arising from fire, civil commotion, tempest, or act of God; nor for the loss or detention of, or damage to, wrappers or packages of any description charged by the company as empties; nor for any loss or detention of, or damage to, any package arising from its being insufficiently or improperly packed, marked, directed, or described, or from its containing a variety of articles liable by breaking to damage each other; nor for leakage arising from bad casks or *cooperage, or from fermentation; and no claim for deficiency, damage, or detention will be allowed unless made within three days after the delivery of the goods, nor for loss, unless made within seven days of the time that they should have been delivered. [*584

“2. If goods (other than perishable goods, which will be dealt with under the next condition) are refused to be received by the consignee, they will be carried back and redelivered to the consignor, who will be required to pay the charge for such back-carriage and redelivery, in addition to the charge for carriage, if not paid.

“3. All goods, from whomsoever received, or to whomsoever belonging, shall be subject to a general lien of the company for any moneys that may be due to the company at the time by the owners or by the persons who shall have delivered the same to the company: and if, after fourteen days’ notice shall have been given to the consignors that such goods are detained for any claim of the company, the money due be not paid, the goods will, at the discretion of the company, be sold to defray the company’s claims, and all expenses incurred thereon. Meat, fish, fruit, and all other perishable articles refused by the consignees, or neglected to be taken away on arrival of the trains, will, at the discretion of the company, be immediately disposed of.

“4. The delivery of goods will be considered to be complete, and the responsibilities of the company to terminate, when the goods shall be unloaded and placed in the care of the consignee, his agent or servant. The company will not be liable in respect of the removal of goods into or out of the consignor’s or consignee’s wagon, ship, craft, wharf, or premises, which removal will be at his risk and expense: nor will the company be liable in respect of goods left on *their premises until called for, or to order, or left or warehoused for [*585 the convenience of the consignor consignee.

“5. The company do not pledge themselves to the time of starting or arrival of the trains, nor will they be liable for loss of market arising from delay, over-carriage, or detention of any train, whether in starting, or at any of the stations, or in the course of the journey. The company do not undertake to send goods by any particular train, if they cannot be conveniently sent by that train, notwithstanding the goods may have been received at the station.

"6. The company will not be liable in respect of goods destined for places beyond the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier, in the usual course, for further conveyance. The company undertakes, if practicable, to deliver such goods to another carrier, to be carried by such other carrier on the same terms and conditions as are herein contained, or, at the company's discretion, to suffer them to remain on their premises pending communication, at the owner's risk. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignor, and for the purpose of being paid to the other carrier.

"7. All goods left until called for, or to order, or suffered to remain upon the company's premises, or, at the option of the company, left in the company's wagon, will so remain at the risk of the owners, and after twenty-four hours from their arrival will be subject to the usual charges of the company, if warehoused, or to the usual charge for demurrage, if left in wagons.

*586] "8. The company will not be answerable for the *loss or detention of any goods which may be untruly or incorrectly declared or described in the declaration or receiving-note furnished to the company. All parcels of goods and packages the contents of which are not specifically declared by the senders, will be charged in the highest class, and, if not exceeding 500 lbs. in weight, will be considered as each containing different kinds of articles, and will accordingly be charged for separately as 'smalls.'

"9. The company will not be liable for loss of or injury to any articles, goods, or things in or about the receiving, forwarding, or delivering thereof, or for any consequential damage connected with the carriage, except on proof that such loss, injury, or damage was occasioned by the neglect or default of the company or its servants.

"10. All goods left with the company, and not taken away after fourteen days' notice to the consignor or consignee, and all empties not taken away within fourteen days after arrival, will be sold, and the proceeds, after defraying expenses and any claim of the company, will be handed over to the owner upon application.

"N. B. The above conditions are those upon which alone the company will carry goods wherever or howsoever received, and do not affect the company's rights as carriers under the Carriers Act, 1 W. 4, c. 68, as to the goods therein enumerated or referred to.

"N. B. The conditions cannot be altered or dispensed with by any person whomsoever, and are applicable for the whole distance carried over the Great Western, the Bristol and Exeter, the South Devon, the South Wales railways, and any other railway or conveyance in connection therewith, or with either of them."

*587] The Great Western Railway joins the Midland *Railway at Gloucester; and it was proved that the packages in question were delivered safely at Gloucester by the defendants' servants to the Midland Railway Company, to be carried by them to Bristol, and there delivered to the Bristol and Exeter Railway Company to be by them carried to their destination, Tiverton Junction. They were de-

livered upon the company's premises by Messrs. Smith & Co., who appeared to be "general railway agents," who kept a receiving-house and collected goods for carriage on the railway, by carts on which were painted the words "Great Western Railway Carriers."

For the defendants it was submitted, that, according to the conditions upon which they received the packages, they were not liable for any loss or detention which occurred off their own line; that they were mere gratuitous bailees, and therefore all that was incumbent on them, was, to carry the goods on their line, and deliver them with reasonable care to the next line; and, further, that the plaintiff should have given some affirmative proof of negligence on the part of the company's servants,—of which there was none whatever beyond the mere fact of the detention of the packages for three weeks.

For the plaintiff it was insisted that she was not bound by the conditions, Smith & Co., who signed them, not being her agents, but the agents of the company. And it was further insisted that the conditions were not just and reasonable, and therefore not binding on the plaintiff.

A verdict was found for the plaintiff, damages 20*l.*; leave being reserved to the defendants to move to enter the verdict for them, if the court should think that under the circumstances they were not liable.

M. Smith, Q. C., in Michaelmas Term, 1862, accordingly [*588] obtained a rule nisi to enter a verdict for the defendants, "on the ground that the declaration was not proved; that, according to the terms on which the goods were received, the defendants were not liable for the delay and damage; that they were not liable, on the terms of the consignment-note; that, if the consignment-note was not binding on the plaintiffs, the defendants were still not liable, as gratuitous bailees, for the detention and damage, and that they performed the duty they undertook; and that there was no proof of such negligence as made them liable." The court were to draw inferences of fact, and the power of amendment was reserved.

Sykes, in Hilary Term last, showed cause.—It is a fallacy to say that these empties are carried gratuitously. The price charged for the conveyance of the packages when full includes the charge for carrying them back empty. Besides, even a gratuitous bailee is liable for gross negligence: *Coggs v. Bernard*, 2 *Ld. Raym.* 909, *Com.* 133, 1 *Salk.* 26, 3 *Salk.* 11, *Holt* 13; *Hutton v. Osborne*, 1 *Selw. N. P.* 445 (12th edit.): though there seems from the cases to be some difficulty as to what gross negligence means,—see the judgments of Bayley, B., in *Owen v. Burnett*, 2 *C. & M.* 353, 4 *Tyrwh.* 133, of Parke B., in *Wyld v. Pickford*, 8 *M. & W.* 443, of Lord Denman in *Hinton v. Dibbin*, 2 *Q. B.* 646 (*E. C. L. R.* vol. 42), 2 *Gale & D.* 36, and of Rolfe, B., in *Wilson v. Brett*, 11 *M. & W.* 113,—at all events, there was such negligence here as the defendants are clearly responsible for. If the company were gratuitous bailees, they are not within the Railway Traffic Act at all; for, that act only applies to common carriers for hire. [BYLES, J.—Strike out of the third plea all about the Railway Traffic Act, and see if what is left of the plea discloses an answer. The defendants say they received the *goods subject [*589] to certain special terms, one of which is that they are not to

be liable for loss, detention, or damage to wrappers or packages charged as "empties," and another that they are not to be responsible for goods destined for places beyond their railway, when such goods have been delivered over to another carrier in the usual course for further conveyance. WILLIAMS, J.—The act imposes fetters upon the company, not on the customer.] One object of the act was, to protect the owners of the goods against improper bargains. Assuming the contract to be within the act, the consignment-note was not shown to have been signed by the plaintiff or by any agent on her behalf. Smith & Co. were the agents or collectors of the company. The company, when they undertake to carry goods from A. to B., are responsible though part of the journey be performed on other than their own line. By s. 7 of the Railway Traffic Act, the conditions must be such as the court or judge shall adjudge to be just and reasonable: and "if any part of such contract should be thought by the judge unreasonable, the whole may be held void:" per Erle, J., in *Peck v. The North Staffordshire Railway Company*, E. E. & B. 980 (E. C. L. R. vol. 96). [*M. Smith*, Q. C.—That has been overruled.] In *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 M. & W. 421, a parcel was delivered, at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Railway Company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost

*590] after it was forwarded from Preston,—it was held that the Lancaster and Preston Railway Company were liable for its loss. In *M'Manns v. The Lancashire and Yorkshire Railway Company*, 4 Hurlst. & N. 327, 349, Williams, J., says, "The company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security that the courts shall see that the condition or special contract is just and reasonable." Is it just or reasonable that a company shall receive goods to be forwarded to a place beyond their own line, and then seek to limit their responsibility in the way attempted here? In *Mytton v. The Midland Railway Company*, 4 Hurlst. & N. 615, the plaintiff took at the Newport station of the South Wales Railway Company a ticket from Newport to Birmingham, for which he paid the entire fare. The South Wales Railway extends from Newport to within twelve miles of Gloucester, which latter distance is traversed on the Great Western Railway; and the Midland Railway Company have a line from Gloucester to Birmingham. By arrangement between the three companies, tickets are issued for the entire distance, and the fares are divided between them according to the mileage travelled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales railway carriage and delivered it to a guard of the Midland Railway Company. On the arrival of the train at Birmingham,

the portmanteau was missing. The court held that the contract was an entire contract with the South Wales Railway Company to convey the whole distance from Newport to Birmingham, and consequently that the Midland Railway Company were not liable.^(a)

**Montague Smith, Q. C., and T. J. Clark*, in support of the [*591 rule.—There was nothing to show that the defendants were any other than gratuitous bailees. [WILLIAMS, J.—I should pause before I held this to be a gratuitous bailment.] It was so put at the trial, and has been so put on this argument. [WILLIAMS, J.—I protest against being supposed to hold, that giving the privilege of sending empties free constitutes the company gratuitous bailees.] It is difficult to say that an article which is carried “free” is carried “for reward.” As to the written contract, two questions arise,—one whether it binds the plaintiff at all,—the other, whether it is within the restrictions of the Railway Traffic Act. As to the first, the evidence showed that Messrs. Smith & Co. were the mutual agents between the company and the sender of the goods. [BYLES, J.—Smith & Co. were clearly agents for the railway company: and, if so, was not a delivery to them a delivery to the company?] At all events the defendants’ liability is excluded by the terms of the special contract. Whatever may have been formerly thought by some judges, it is clearly settled now, that, if any one of the conditions negating the company’s liability is just and reasonable, it affords an answer to the action. Here, no just exception can by possibility be made to the first or the second condition. The sixth and the ninth are also, it is submitted, good. The duty of the defendants was performed when they carried these packages to Gloucester and there delivered them to the servants of the Midland Railway Company. In *Blake v. The Great Western Railway Company*, 7 Hurlst. & N. 987, Cockburn, C. J., says: “It has been settled, that, where a railway company enters into a contract for the conveyance of goods to a distance extending not merely over their own line, but over the whole or some portion of any other line of railway with which it is *connected, the company so contracting is liable, not only for the loss of the goods [*592 upon their own line, but also in respect of the loss of the goods upon the line not their own. I think that position obtains in the case of passengers. If a railway company chooses to contract to carry passengers not only over their own line but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line.” But there the defendants took the price of the whole journey. Here, nothing being paid, the defendants’ contract is simply to carry to the end of their own line. Upon the face of these conditions, it is impossible to infer a contract to carry over the three sets of lines. In *Lewis v. The Great Western Railway Company*, 5 Hurlst. & N. 867, the following conditions were held to be just and reasonable,—“No claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered:” and “the company

(a) See *The Midland Railway Company, app., Bromley, resp.*, 17 C. B. 372 (E. C. L. R. vol. 84).

will not be answerable for the loss or detention of any goods which may be untruly or incorrectly described in the receiving note." In *Harrison v. The London, Brighton, and South Coast Railway Company*, 2 Best & Smith 122 (E. C. L. R. vol. 110), a passenger by railway from London to Worthing took with him two horses and a retriever, the horses were put into a horse-box, and a servant of the defendants proposed that the dog should be placed in the horse-box, to which the plaintiff assented. The dog was fastened in the horse-box by means of a leather collar round its neck, and a strap thereto, which passed through a ring fixed to the side of the horse-box: the collar and strap were furnished by the plaintiff, and were his property. The plaintiff's *593] agent signed a ticket, subject to the following conditions,— "The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them, and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent., or 6*d.* in the pound, upon the declared value above 40*l.* [or 5*l.*], whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried." It was held by the Exchequer Chamber (a) that these conditions were just and reasonable. (b) [WILLIAMS, J.—I cannot think it reasonable that the company should stipulate for freedom from liability for loss or damage occurring on other lines, where they contract for the carriage the whole way. If they undertake to carry the whole distance, they make the other railways their agents for the carriage on their own lines; and it cannot be reasonable for them to contract that they shall not be responsible for the negligence of their agents.] The mere fact of the packages not having reached their destination, is not *594] proof of negligence: *Gilbart v. Dale*, 5 Ad. & E. 543 (E. C. L. R. vol. 27); *Bird v. The Great Northern Railway Company*, 28 Law J. Exch. 3. Here, the only evidence was, that the packages did not arrive until three weeks after they should have arrived, and that they were then in a damaged state: there was no evidence to show how or where the damage was occasioned. Where the evidence is quite as consistent with one view as the other, the party on whom the onus lies fails to make out his case: per Crowder, J., in *The Midland Railway Company, app., Bromley, resp.*, 17 C. B. 382; *Cotton v. Wood*, 8 C. B. N. S. 568 (E. C. L. R. vol. 98); *Hammack v. White*, 11 C. B. N. S. 588 (E. C. L. R. vol. 103).

It being intimated to the court that the principal question was now

(a) Contrary to the opinions of Cockburn, C. J., and Blackburn, J., in the court below, and of Wilde, B., in the court of error. And see *Simons v. The Great Western Railway Company*, 13 C. B. 305 (E. C. L. R. vol. 86); *The London and North Western Railway Company, app., Ducham, resp.*, 18 C. B. 326.

(b) *Vide post*, 597, 598.

awaiting the judgment of the House of Lords in *Peek v. The North Staffordshire Railway Company*, they suspended their judgment herein. *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the court: (a)—

This was an action against the defendants as carriers. The declaration stated that the defendants as common carriers received certain tubs, packages, and baskets of the plaintiff, to be safely carried for reward from Hereford to Tiverton Junction and there delivered to the plaintiff; and charged that the defendants did not duly deliver them or take due care of them.

The defendants pleaded,—first, the general issue,—secondly, that the goods were not delivered to them to be carried on the terms in the declaration mentioned,—thirdly, as to the loss and detention, a special *contract in writing under the Railway Traffic Act, [*595 1854 (17 & 18 Vict. c. 31), signed by the person delivering the goods, and containing what the defendants alleged to be a reasonable and just condition, viz., that the defendants should not be liable for any loss or detention of or damage to goods destined for any place beyond the limits of the defendants' railway, after they should have been delivered by the defendants to another railway; that the goods in question were destined for a place beyond the limits of the defendants' railway; and that the loss and detention occurred after they had been delivered over to another carrier. Issue was joined on these pleas.

On the trial, it appeared that the plaintiff was a fruit-dealer, and had sent the tubs and baskets which were the subject of the action, full of fruit, to Hereford. It was the understanding and the practice between the plaintiff and defendants that the baskets or tubs which had been delivered to the defendants *full* should when *empty* be returned or despatched by the defendants as "empties," without further charge. Accordingly, from Hereford the tubs, packages, and baskets were sent by the plaintiff as "empties," and directed to the Tiverton Junction. They were delivered to the railway, and booked at Hereford for Bristol only, by a person of the name of Smith, a general carrier, who appears to have acted for both parties, and who was alleged to be the common agent of the plaintiff and defendants. He signed in the plaintiff's name a printed contract containing amongst other conditions the following:—

"1. The company will not be answerable for the loss or detention of, or damage to, wrappers or packages of any description charged by the company as 'empties.'

"2. Nor in respect of goods destined for places *beyond [*596 the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits, will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier.

"3. The company will not be liable for any loss of, or injury to

(a) The case was argued before Erie, C. J., Williams, J., Willes, J., and Keating, J.

articles, except on proof that such loss or injury was occasioned by the neglect or default of the company or its servants."

The goods were duly carried and forwarded as far as Gloucester, where the defendants' railway ends. From Gloucester to Bristol, they were carried on the Midland Railway, and from Bristol to Tiverton Junction on the Bristol and Exeter Railway. The damage and detention happened after the goods had left the defendants' line.

The learned counsel for the plaintiff contended that the conditions on which the defendants relied for protection were not just and reasonable conditions within the proviso in the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7; and that the contract for the conveyance of the goods had not been signed by the person delivering them.

It was not contended that the defendants were not common carriers: but it was contended that they were not in this case carriers *for reward*.

All amendments were left in the discretion of the court.

The jury found a verdict for the plaintiff, damages 20*l*. The defendants had leave to move to enter a nonsuit; the court to draw any inferences of fact consistent with the finding of the jury as to the amount of damages.

*597] After argument, the court suspended its decision until the publication of the judgment of the House of Lords in the case of *Peek v. The North Staffordshire Railway Company*,—since reported in 32 Law J. Q. B. 241.

The result of that decision, so far as it is applicable to the present case, is this, that any condition limiting the liability of a railway company as carriers must be a condition just and reasonable in the judgment of the court, and must be set out in a written contract signed by or on behalf of the consignor. The first question, therefore, which arises is, whether either the first condition, that the company will not be liable for packages charged as empties, or the second condition, that they will not be liable in respect of goods lost or damaged beyond the limits of the company's railway, be just and reasonable. Either of these two conditions, if legal, would suffice to protect the defendants.

It will be unnecessary to discuss the first condition, if the second is legal. But, as to the first condition, we may observe that we are by no means prepared to accede to the suggestion, that, because no charge is made for the return of empty packages, therefore the company necessarily convey them on their own line gratuitously. The company may justly be considered as having had the carriage of the empties prepaid in the shape of the previous payment for the carriage of the same packages when full, including an obligation on the railway to carry the empties back without further charge.

We are, however, of opinion that the second condition is legal, and does protect the defendants. The railway company do not thereby attempt to protect themselves from injuries or delay happening on their own line, or through the negligence of themselves or of their
*598] own servants, or even on a further line where they have received any compensation for carriage on that further line.

Even if the full carriage down to their ultimate destination had

been paid on these empties, it would, by the express words of the condition (so far as regards the excess over and above the amount of carriage on the defendants' own line), have been received for the purpose of being handed over to the further carrier. The company, therefore, when they forward goods on a further line, have no control, and receive no payment. To stipulate that under these circumstances they shall not be responsible for loss or delay on the further line, seems to us just and reasonable.

It may be objected, as above suggested, that the company do in the case of empties receive and retain payment for the whole transit, because payment has been previously received by them in the shape of the carriage paid for the conveyance of the packages when full, and also for the obligation on the railway company to carry or send the empties to their ultimate destination without charge. But, suppose the further railway had been paid in money by the defendants for carrying the empties, then the defendants, though they might have received, yet they would retain no value for the transit on the further line. It makes no difference, if, instead of paying the further railway in money, they pay by reciprocating the service, and carrying on their own line empties coming from the further line, or by any other arrangement onerous to themselves and beneficial to the further line.

The evidence in this case affords no information as to the dealings between the railways. But, as we cannot assume that an ordinary tradesman furnishes goods or labour in the way of his trade gratuitously, so *neither can we assume without proof that one railway is in the habit of carrying empties for another railway [*599 without any reciprocation of the benefit or any compensation of any kind. Therefore the company, in the case of empties forwarded on another line, cannot be taken, either directly or indirectly, to receive for their own benefit any portion of the carriage on the further line.

The remaining question is, whether the special contract in this case was duly signed. Smith seems to have been a carrier employed both by the plaintiff and the defendant, and employed by the plaintiff in this particular instance to cart and deliver the empties to the railway. He signs the contract in the name of the plaintiff. We can discover no good reason why his signature should not bind the plaintiff. The utmost that can be said, is, that the plaintiff had little choice but to employ him, and that he was agent for both parties. But the plaintiff did *in fact* employ him; and, in general, the signature of a common agent binds either party. It has been repeatedly so held upon the construction both of the 4th and the 17th section of the Statute of Frauds: see the cases collected in Sugden's Vendors and Purchasers, 14th edit. p. 147.

There was, therefore, in this case a protection afforded to the defendants by a reasonable condition contained in a signed contract within the true meaning of the Railway and Canal Traffic Act, as interpreted by the House of Lords.

But we must not be considered as deciding, that, in the case before the court, it was necessary for the defendants to bring themselves within the proviso in that act of parliament; for, the result of the facts in this particular case may be that the defendants' undertaking

a bathing-machine is prohibited between the said point called Rockanore and the said mouth of the Priory Water.

11. The limits of the jurisdiction of the commissioners under the said act did not extend westward beyond the mouth of the said Priory Water: and no public body existed prior to the passing of the act of the 14 & 15 Vict. c. 98, hereinafter more particularly referred to, having jurisdiction to license bathing-machines over the locus in quo.

12. The sea-beach or foreshore throughout the whole length of the borough of Hastings, including the locus in quo, has been from time immemorial used by the public for all purposes of passing and repassing, for the plying of pleasure-boats, unloading vessels, drying nets, and generally (except so far as appears in this case to the contrary) as a place of public resort, subject, since the passing of the 2 W. 4, c. xci., to the jurisdiction conferred by the said act on the commissioners acting under it; and, since the passing of the 14 & 15 Vict. c. 98, subject *604] to the jurisdiction granted by the public health acts to the local board of health for the district of Hastings.

13. On the 20th of March, 1851, a provisional order for the application of the Public Health Act, 1848, to the borough of Hastings, was duly made; and by the said order the general board of health did, after reciting amongst other things, the local act of 2 W. 4, c. xci., and another local act passed in the 2d year of the reign of W. 4, intituled "An Act for better paving, lighting, and watching, and otherwise improving the town of St. Leonard, in the county of Sussex," amongst other things, order and direct as follows—

"(1.) That, from and after the passing of any act of parliament confirming this present order, the Public Health Act, 1848, and every part thereof, except the section numbered 50 in the copies of that act printed by Her Majesty's printers, and except so much of the section numbered 12 in the said copies of the said act as provides 'that, in every district exclusively consisting of the whole or part of one corporate borough, the mayor, aldermen, and burgesses of such borough shall be, by the council of the borough, within and for such district the local board of health under this act,' and, except so much of the said act as relates to the election or selection of members to serve on local boards of health under the said act, shall apply to and be in force within and throughout the entire area, places, and parts of places comprised within the boundaries of the said borough of Hastings, as the same were fixed for the purposes of the said act for the regulation of municipal corporations in England and Wales; and that the said borough and places and parts of places shall be and constitute one district for the purpose of the said Public Health Act accordingly.

"(2.) That the mayor, aldermen, and burgesses of the said borough *605] of Hastings, by the council of the said borough, together with two persons duly qualified for election as members of the said council for the west ward of the said borough, shall constitute the local board of health under the aforesaid act.

"(6.) That, from and after the passing of any act of parliament confirming this order, such parts of the said local acts as are specified in the schedule hereunto annexed shall be repealed, except in so far as the same repeal any other act or acts of parliament.

"(8.) That, from and after the passing of any act of parliament con-

firming this order, such of the said powers, authorities, and duties as are granted or imposed by so much of the acts as shall not be repealed according to the provisions of this order, and so far as the same are not repugnant to or inconsistent with the said Public Health Act or this order, or any by-laws which shall be lawfully made under the said Public Health Act, shall be transferred to and be had and exercised by the said local board of health, and by such of the committee, officers, and servants of the said local board as shall be appointed by such board in that behalf under the said Public Health Act, and shall be had and exercised in the same manner, as nearly as may be, as if such powers, authorities, privileges, and duties had been granted or imposed by the said Public Health Act.

"(9.) That, from and after the passing of any act of parliament confirming this order, the said local board shall be the commissioners for executing such parts of the said local act as shall not be repealed according to the provisions of this order.

"(11.) That, from and after the passing of any act of parliament confirming this order, all parts and places within the said borough of Hastings shall be within and subject to such of the provisions of the said local acts as shall not be repealed according to the provisions of this order, as fully as if the same had always been subject to and within the provisions of the sections numbered respectively in the copies of the secondly hereinbefore-recited local act printed by the King's printers, from 83 to 85, and from 88 to 95, all inclusive, and from and after the establishment of a market within the limits of such local act, except the provisions of the section numbered 83 in the copies of the firstly hereinbefore recited local act, and except in so far as relates to any debts contracted on the security of rates assessable on any part within the limits of the said borough so fixed as aforesaid. [*606

"(17.) That, from and after the passing of any act of parliament confirming this order, the sections of the 'Towns Improvement Clauses Act, 1847' (10 & 11 Vict. c. 84), numbered respectively, in the copies of that act printed by Her Majesty's printers, 53, 74, and 109, and the sections of "The Towns Police Clauses Act, 1847" (10 & 11 Vict. c. 89), numbered respectively, in the copies of that act printed as aforesaid, 21 to 69, both inclusive, shall be incorporated with so much of the said local acts as remains unrepealed by this order, and with the said Public Health Act as applied to the said borough by this order, and any act of parliament confirming the same; and that the expression 'the special act,' used in the said sections, shall be construed to mean so much of the said local acts as remains unrepealed and the said Public Health Act so applied as aforesaid; and the expression 'limits of the special act,' used in the same sections, shall be construed to mean the district constituted by this order and any act of parliament confirming the same for the purposes of the said Public Health Act; and the expression 'the commissioners,' used in the said sections, shall mean the said local board."

The parts of the local acts referred to in this order to be repealed, are as follows, that is to say,—

*The sections numbered respectively in the copies of the firstly hereinbefore-recited act of the 2 W. 4, c. xci., printed by the King's printers, 2 to 10, both inclusive, 12 to 21, both inclu- [*607

sive, 23 to 30, both inclusive, 35 to 38, both inclusive, 40, 41, so much of the 46th as relates to appeals against orders therein described, 59, 66 to 70, both inclusive, 81, 82, 93 from and after the establishment of any markets under and by virtue of the provisions of the secondly hereinbefore-recited local act, 94 to 96, both inclusive, 98 to 104, both inclusive, 116 to 146, both inclusive, 159 to 163, both inclusive, 165, 166, 168 to 181, both inclusive, 183, 185 to 191, both inclusive:

And the sections numbered respectively in the copies of the said secondly hereinbefore-recited act of the same year printed by the King's printers, from 2 to 8, both inclusive, 10 to 23, both inclusive, 25 to 30, both inclusive, 33 to 82, both inclusive, except in so far as s. 64 gives any rights to James Burton, his heirs or assigns, or persons employed by him or them, 86, 87, from 96 to 106, both inclusive, from 108 to 121, both inclusive, 123, from 125 to 147, both inclusive:

And so much of any unrepealed part of either of the said acts as fixes the amount of any penalty for any offence under either of the said acts, where the penalty for such offence is fixed by the Public Health Act, or by any by-law of the local board of health made under and by virtue of the Public Health Act, at an amount other than that fixed by either of the said local acts.

14. The said provisional order was afterwards, on the 7th of August, 1851, duly confirmed by an act of parliament 14 & 15 Vict. c. 98, except as in the said act of parliament stated.

*608] 15. On the 12th of September, 1851, certain *by-laws were made by the local board of health for the said district of Hastings, and confirmed by the Secretary of State, for the purpose, amongst other things, of regulating bathing-machines licensed to ply for hire within the said district. By those by-laws, it is, amongst other things, provided, that all licenses should be in force for one year from the date thereof, or until the next general annual licensing meeting which should first happen, and no longer; that every such license should contain the number of the bathing-machines so licensed; and that the number of such bathing-machine should be painted in a conspicuous place on the top of each door, with figures not less than two inches in height.

16. On the 3d of August, 1855, a certain by-law was made by the local board of health, and confirmed by the Secretary of State, whereby it was ordered, "That, if any person should undress on the sea-beach or shore, or should bathe from such beach or shore between the hours of 8 o'clock in the morning and 9 o'clock in the evening (except from a bathing-machine), at any part of the sea-coast between the Priory Water and the town of St. Leonard, being within the district of the local board of health of the district of Hastings, in the borough of Hastings, such person should for every such offence, forfeit and pay any sum not exceeding 20s."

17. On the 3d of August, 1860, certain amended by-laws were made by the local board of health, and confirmed by the Secretary of State, whereby it was amongst other things ordered,—“That no person should bathe from the sea-shore, or from a boat within 100 yards thereof, at any part of the frontage between the old East Groyne and 39 Martello Tower, without wearing drawers, between the hours of 6

a. m. and 9 p. m.; that the owner of each bathing-machine *should cause to be affixed on a conspicuous part of each [*609 machine a notice cautioning persons against bathing without drawers; and that the local board should have power from time to time to ascertain, fix, alter, and remove the stands for bathing-machines, and to limit the number at each stand."

18. The said by-laws of the 12th of September, 1851, and the said amended by-laws of the 3d of August, 1860, were set forth at length in a printed copy of by-laws of the local board of health for the district of Hastings, which accompanied, and was to form part of this case.

19. In accordance with these by-laws, bathing-machines have been placed at different points on the foreshore, by the authority of the said local board.

20. On the 19th of April, 1862, the following license was granted by the said local board of health for the district of Hastings to the defendant:—

"Hastings Local Board of Health.

"No. 28.

License.

"We, the mayor, aldermen, and burgesses of the borough of Hastings, the local board of health within the district of Hastings in the said borough, under and by virtue of the Public Health Supplemental Act, 1851, No. 2, do hereby license and authorize the bathing-machine No. 28, whereof Alfred Philcox, of, &c., is owner, to stand and ply for hire and be used within the said borough of Hastings (except within the town of St. Leonard), subject to the by-laws, rules, orders, and regulations made and to be made by the said local board of health under the aforesaid act. This license to commence from the day of the date hereof, and to be in force for one year thence next ensuing, or until the next general licensing meeting for granting such licenses, which shall first happen, and no longer.

*"Given under our common seal this 19th day of April, [*610 1862."

21. A similar license was granted to the defendant, varying only as to the number, for each of his machines.

22. The defendant, assuming to act under this license, and without any leave to do so from the plaintiff, placed and continued the bathing-machines on the locus in quo, which are the trespasses complained of. The defendant contends he is entitled so to place and continue the said bathing-machines as aforesaid, under the said licenses from the local board of health, although he has had notice not to do so from the plaintiff.

23. The bathing-machines hereinbefore-mentioned as belonging to Dunn and to the defendant, and plying for hire on the locus in quo, were also licensed by the local board, and were also inspected upon the locus in quo by the inspector of bathing-machines appointed by the local board, and purported to conform in all respects to the by-laws made by the local board.

24. No bathing-machines have at any time been used within the district of the local board other than such as are licensed by the said board

25. Notice of this action was duly given in due form of law, as required by the statute in that behalf.

26. The statements herein are admitted for the purposes of this case, and not otherwise.

27. The court shall be at liberty to draw any inferences, or find any facts which in the opinion of the court a jury ought to have drawn or found.

The question for the opinion of the court was, whether the defendant was liable in this action for placing and continuing as before stated his bathing-machines on the locus in quo; and if the court should be of opinion that he was so liable, then the verdict entered *611] for the plaintiff as aforesaid was to stand for the said 40s., with taxed costs on the full scale; but, if the court should be of a contrary opinion, then a verdict was to be entered for the defendant, with like costs.

Prentice (with whom was *F. M. White*), for the plaintiff(a)—The public have no common-law right of bathing in the sea, and, as incident thereto, of crossing the sea-shore on foot or with bathing-machines for that purpose: *Blundell v. Catterall*, 5 B. & Ald. 268 (K. C. L. R. vol. 7). [*ERLE*, C. J.—If you can lawfully get to the sea-shore, I apprehend you may lawfully bathe there.] The plaintiff is the owner of the foreshore under lease from the Crown. The fact that people have been accustomed to bathe there without interference for a long series of years does not confer a right. The 71st section of the local act, 2 W. 4, c. xci., which empowers the commissioners to license bathing-machines to ply for hire on the beach, merely amounts to this, that without such license they shall not be used; but it does not give the commissioners power to authorize the owners of machines to commit a trespass. The 79th section in like manner empowers the commissioners to establish a market or markets within the town and port; but that power cannot be exercised to the prejudice of private rights of property in the town. So, the *612] regulations which the local commissioners or local boards are empowered by the 69th section of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), to make for the regulation of bathers, was not intended to interfere with private rights. The license to the defendant to use bathing-machines can only, it is submitted, justify his using them in places where he can do so without infringing any private right.

Lush, Q. C. (with whom was *Denman*, Q. C., and *R. H. Hurst*), contra.(b)—It appears from the statements in the special case, that,

(a) The points marked for argument on the part of the plaintiff were as follows:—

"That the defendant is liable in this action for placing and continuing the bathing-machines in the locus in quo: that the local board had no power to authorize the defendant to interfere with private rights or property, or to place his bathing-machines on the locus in quo: that, in fact, the local board have not authorized the defendant to commit the trespass complained of: and that the plaintiff, as lessee of the Crown, is entitled to the locus in quo."

(b) The points marked for argument on the part of the defendant were as follows:—

"1. That the defendant is not liable in this action for placing or continuing the bathing machines in the locus in quo:

"2. That the local board of health had power to license and regulate bathing-machines, and to authorize the defendant to place and use the same within their jurisdiction:

"3. That the local board of health did duly license and regulate the bathing-machines of the defendant, and authorized him in accordance with by-laws duly made and allowed and in force

from time immemorial, all persons were in the habit of bathing without bathing-machines from all parts of the sea-shore at Hastings, including the locus in quo, which is the property of the Crown, now under lease to the *plaintiff. In 1832, the local act (2 W. 4, c. xci.) passed, the 77th section of which imposed a penalty of [*613 20s. on any person who should undress on the sea-beach, or should bathe in the sea, except from a bathing-machine, at any place on the coast between the point called Rockanore and the mouth of the Priory Water: and the 71st section authorized the commissioners to license bathing-machines. The shore thus referred to did not include the locus in quo. Along that part people continued to bathe as before. By the 11th clause of the provisional order of 1851, referred to in paragraph 13 of the special case, it was provided, that, from and after the passing of any act of parliament confirming that order, all parts and places within the borough of Hastings should be within and subject to such of the provisions of the local acts as should not be repealed according to the provisions of that order, as fully as if the same had always been subject to and within the provisions of the local act. The 71st and 77th sections are unrepealed. The effect is, to apply those two sections to the whole coast of the borough, including the locus in quo. The 69th section of the Towns Police Clauses Act, 1847 (which is incorporated), is to the same effect. After this, the plaintiff obtains a lease from the Crown, and seeks to establish a monopoly of this part of the shore for himself. There is nothing in the case of *Blundell v. Catterall* to interfere with the right which the defendant here claims.

Prentice, in reply.—This is not a mere question of a right of an inhabitant of Hastings to bathe on the spot in question. It does not even appear that the defendant is an inhabitant of the borough. [ERLE, C. J.—The case is not so stated as to enable us to determine the right to bathe in the locus in quo.] Such a custom would be bad. The whole of the sea-shore is the property of the corporation, with the exception *of the locus in quo. It may be that the public have acquired a right to use bathing-machines in those [*614 parts where the soil belongs to the corporation, because the corporation do not object to it. The provisional order cannot confer a right upon the corporation to authorize a trespass upon the land of an individual.

ERLE, C. J.—I am of opinion that the plaintiff in this case is entitled to judgment. He is the owner of land on the sea-shore at Hastings, and the defendant claims a right to place a bathing-machine there. There is nothing stated in this special case to authorize me to hold that the defendant had that right. I am desirous of guarding my judgment so as not to restrict the valuable usage or right of Her

within their jurisdiction with reference to public bathing on the sea-shore used as a public bathing-place:

"4. That the defendant acted under such license, and what he did as complained of in this action was justifiable and lawful:

"5. That the plaintiff is not entitled, as lessee of the Crown, or otherwise, to stop the right exercised from time immemorial of bathing at the locus in quo, or the use for that purpose of bathing-machines, as now required:

"6. That the defendant is entitled, according to the facts shown in the special case, to have the verdict in this action entered for him."

Majesty's subjects to resort to the sea-shore for bathing purposes. But it appears that the usage here insisted upon is of a very wide extent. Part of the shore of Hastings, it seems, is in the corporation. As to that part, there is no dispute as to the right of bathing and of placing licensed machines there for that purpose. But the spot in question where the right is contested is the property of the Crown, and is now under lease to the plaintiff. I take it to be clear that the usage of bathing along the shore gives no right to the persons availing themselves of it to place machines there, whether drawn by horses or by means of a capstan. The provisions relied on by the defendant are prohibitory only,—enactments for the purpose of preserving decency in a populous neighbourhood with houses near, by regulating the time and manner of bathing and the use of proper dresses and machines. But those restrictions cannot take away the rights of the owner of the soil: there is nothing in any of the acts, or in the by-laws, to warrant the placing a bathing-machine in any spot where people had *615] been in the habit of bathing before. It would be extremely *dangerous to hold that the prohibition to bathe without a machine operated to confer a right to place a machine on the land for the purpose of bathing.

WILLIAMS, J.—I am of the same opinion. I do not mean to express any judgment as to the right of the public to use the fore-shore for the purpose of bathing. But there clearly is nothing in the acts, supposing such right existed, to subject the plaintiff's land to the further servitude of having bathing-machines brought there for that purpose.

WILLES, J.—I am of the same opinion. There clearly is nothing in the local act of 2 W. 4, c. xci., ss. 71, 77, or in the 69th section of the 10 & 11 Vict. c. 89, which are mere regulations for enforcing the observance of decency and propriety, that can by possibility be construed to confer a new right.

KEATING, J.—I am entirely of the same opinion. Mr. Lush's argument is based on the 71st section of the 2 W. 4, c. xci., which (the 77th section prohibiting bathing except from a machine) he says empowers the commissioners to authorize the placing of bathing-machines on any part of the coast,—the subsequent provisional order extending it to the whole of the shore. That order does in terms extend the provision of the local act to the whole of the shore. But up to that period Mr. Lush does not contend that the Crown would not have a right to prohibit the placing of bathing-machines on the locus in quo. I think it would be monstrous to hold that the subsequent provisional order could deprive the Crown of that right. The plaintiff deriving title from the Crown, therefore, is entitled to all the rights the Crown had.

Judgment for the plaintiff.

***BENNETT and Another v. BENHAM. Jan. 12. [*616**

Where one of two plaintiffs resides within and the other without the distance of twenty miles from the defendant, and the sum recovered is under 20*l.* in contract, and 5*l.* in tort, the case is one of concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95.

Upon a motion for costs under the 15 & 16 Vict. c. 54, s. 4, after an unsuccessful application to a judge at Chambers, the plaintiff must bring before the court all *relevant* materials which were used before the judge.

THIS was an action brought by the plaintiffs, "forage contractors" carrying on business at King's Arms Wharf, Belvidere Road, Lambeth, in the county of Surrey, to recover from the defendant the sum of 6*l.* 7*s.* for goods sold and delivered. The defendant pleaded payment into court of 6*l.* 7*s.* The plaintiffs took the money out of court, and applied by summons at Chambers for costs, under the 15 & 16 Vict. c. 54, s. 4. The affidavit in support of the summons was made by the plaintiff John Bennett, who swore, that, at and before the commencement of this action, his partner, the plaintiff John Edwards Bennett, resided and dwelt and had ever since continued to reside and dwell at No. 28, Brunswick Square, Brighton, in the county of Sussex, and that such residence was more than twenty miles from the place where the defendant resided and dwelt and carried on his business at the time of the commencement of the action; that the defendant at the time of the commencement of the action resided and dwelt and carried on business at Belvidere Road, Lambeth, aforesaid, and not elsewhere, to the best of the deponent's knowledge and belief; and that the plaintiff John Edwards Bennett did not at the time of the commencement of the action reside or dwell at any other place than No. 28, Brunswick Square, Brighton, aforesaid, which was upwards of fifty miles distant from the defendant's residence and place of business at Belvidere Road aforesaid.

In support of the summons the plaintiffs relied upon *Waterlow v. Dobson*, 80 Law Times 150.

The affidavit of the defendant in opposition to the summons, stated, in substance, that the plaintiffs were hay-salesmen, and carried on their business at Belvidere Road, Lambeth; that he (the defendant) resided at College Wharf, Belvidere Road, Lambeth, [*617 aforesaid, about 100 yards from the plaintiffs' place of business; that the goods were ordered of the plaintiffs at their place of business, Belvidere Road, Lambeth, aforesaid, and the same were delivered to the defendant at his house College Wharf, Belvidere Road, Lambeth, aforesaid; and that the plaintiffs' place of business and residence and the defendant's place of business and residence were within the jurisdiction of the county court of the borough of Southwark.

The learned judge, after time taken to consider, endorsed the summons "No order."

Hance, in Michaelmas Term last, obtained a rule calling upon the defendant to show cause why the plaintiffs should not recover their costs. The rule was drawn up on reading the affidavit of the plaintiff John Bennett, and also an affidavit of the plaintiffs' attorney, which stated, that, the defendant having paid into court the amount sought to be recovered in this action, the deponent on the 6th of June last delivered a replication to the defendant's attorney, taking the

money out of court in full satisfaction and discharge of the causes of action in the declaration mentioned; that, on the 11th of June, he took out a summons for costs, which was attended before Willes, J., on the 15th, when the learned judge took time to consider, and ultimately endorsed the summons "No order;" that, at the time of the commencement of the action, the plaintiff John Edwards Bennett resided and dwelt, and had ever since resided and dwelt, and still resided and dwelt, at No. 28, Brunswick Square, Brighton, in the county of Sussex, and not elsewhere; and that such residence was more than fifty miles distant from Belvidere Road, Lambeth. He *618] referred to *Hickie v. Salamo*, 8 Exch. 59, where the Court of Exchequer, after time taken to consider, held, that, where one of several plaintiffs dwells more than twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county courts.(a)

Dowdeswell, on a subsequent day, showed cause.—Construing the words of the concurrent jurisdiction clause, s. 128, of the County Courts Act, 9 & 10 Vict. c. 95,—“where *the plaintiff* dwells more than twenty miles from the defendant,”—by the aid of the interpretation clause (s. 142), which declares that “every word importing the singular number shall, where necessary to give full effect to the enactments therein contained, be understood to mean several persons or things as well as one person or thing,”—it is submitted that “plaintiff” must mean the entire plaintiff; *all*, where there is a plurality. [BYLES, J.—It has been held in this court, that, where the plaintiff has a dwelling within twenty miles and another beyond that distance, the case is within the concurrent jurisdiction clause.(b) ERLE, C. J.—We have a decision of the Court of Exchequer which is precisely in point. I am wholly unable to distinguish *Hickie v. Salamo*, and therefore must hold myself bound by it.] The court will hardly hold itself bound by a decision of a court of co-ordinate jurisdiction, in a matter as to which there is no appeal. At all events, this rule must be discharged on the ground that the plaintiff has omitted to bring before the court the materials which were before the learned judge at Chambers, which by the practice of the court he was bound to do. In *Warman v. Halahan*, 30 Law J., Q. B. 48, it was distinctly held, *619] that, if a plaintiff *applies for costs to a judge at Chambers, under the 15 & 16 Vict. c. 54, s. 4, and is refused, he cannot afterwards apply to the court as having independent jurisdiction to grant costs, but must come by way of appeal from the judge’s decision; and in such case he must apply in a reasonable time, and must draw up his rule on reading the affidavits used at Chambers.

Hance, in support of his rule.—The rule is drawn up on all the materials which were necessary to make the court aware of the facts and merits of the case. [ERLE, C. J.—In *Warman v. Halahan*, none of the materials which were before the judge at Chambers were brought before the court: the plaintiff altogether concealed from the court the fact that he had already been to Chambers.] No doubt the rule is, that, upon an appeal from a decision of a judge at Chambers all the materials used before the judge must be brought before the

(a) And see *Parry v. Davies*, 1 L. M. & P. 379, and *Doyle v. Lawrence*, 2 L. M. & P. 368.

(b) See *Butler v. Ablewhite*, 6 C. B. N. S. 740 (E. C. L. R. vol. 95).

court: but this is not an appeal against a decision of the judge. [ERLE, C. J.—Warman v. Halahan shows that it is.] Sufficient materials, at all events, are before the court: and, Hickie v. Salamo being precisely in point, this rule must be made absolute.

ERLE, C. J.—I should be very scrupulous in laying it down as a general rule, that, upon a motion to the court which is in substance an appeal from a decision of the judge at Chambers, *all* the materials which were before the judge must be brought before the court. That would be a very formidable rule to lay down, and one which would in many cases lead to wasteful expenditure. We will take an opportunity of conferring with the other judges, in order to ascertain whether there is any general practice upon the subject.

*WILLIAMS, J.—It might lead to unjust consequences in many cases if the decision of the court were to differ from that of the judge at Chambers, unless the materials which were before him were also brought before the court. [*620 *Cur. adv. vult.*]

ERLE, C. J.—This is in effect an application to review a decision at Chambers, whereby a learned judge refused to allow the plaintiffs their costs under the 15 & 16 Vict. c. 54, s. 4, which, amongst other things, enacts, that, in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the 13 & 14 Vict. c. 61, whether there shall be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, the court in which such action is brought, or the said judge at his Chambers, shall by rule or order direct that the plaintiff shall recover his costs. Upon the discussion of the rule, we were of opinion, upon the authority of the case of Hickie v. Salamo, 8 Exch. 59, that, where there are two plaintiffs, one of whom lives within twenty miles from the defendant and the other more than twenty miles, the case is one of concurrent jurisdiction, and therefore that the plaintiffs were entitled to their costs. The learned counsel for the defendant, however, took an objection that, the proceeding being in the nature of an appeal against a decision at Chambers, the plaintiffs were, by the practice of the court, bound to draw up their rule upon reading *all* the affidavits which had been used before the learned judge at Chambers. And a case of Warman v. Halahan, 30 Law J. Q. B. 48, [*621 was relied upon to support that contention. I do not, however, think we shall be at all conflicting with that decision by holding that materials which are irrelevant must be taken to be non-existing. All the materials used at Chambers which were at all relevant to the matter having been brought before this court, we think the plaintiffs have sufficiently complied with the rule of practice.

Rule absolute.

DODS and Another v. EVANS, Administrator de Bonis non of
JOHN DAVIES, deceased. Jan. 22.

The declaration contained three breaches,—1. for arrears of sleeping rent due upon a mining lease,—2. for not keeping the mine in repair,—3. for not properly working. The defendant suffered judgment by default; and, upon the execution of a writ of inquiry, the jury gave the plaintiffs 50*l.* damages on the first breach, but *refused to find any damages on the second and third breaches*:—Held that the plaintiffs were nevertheless entitled to the expenses of witnesses called to prove those breaches, whom the Master in the exercise of his discretion thought material and necessary,—the plaintiffs being entitled as matter of law to nominal damages on those breaches.

THIS was an action brought to recover a sum of 50*l.* for arrears of sleeping-rent of 20*l.* per annum, due upon a mining lease granted to the deceased John Davies, for damages for breach of covenant in not keeping the mine in repair, and for damages for not properly working the mine.

The defendant having suffered judgment to go by default, a writ of inquiry was issued; which was executed before the sheriff of Middlesex on the 19th of November last. The jury found a verdict for the plaintiffs for 50*l.* in respect of the rent; and they expressly found that the plaintiffs had sustained no damage in respect of the breach *622] as to dilapidations, or in respect of the breach in not properly working the mine.

On the taxation of costs, it was urged on the part of the defendant, that the plaintiffs, having only succeeded in respect of a liquidated amount, should have specially endorsed their writ for that sum, under the provisions of the Common Law Procedure Act, 1852, and were entitled to no more costs than if they had done so; and that, having failed in that part of their case as to which alone the witnesses were called, the plaintiffs were not entitled to the costs of those witnesses.

The Master, however, allowed the plaintiffs full costs, and also the expenses of all the witnesses.

Murray, on a former day in this term,—upon an affidavit detailing the above facts, and also stating that the whole of the evidence given on the part of the plaintiffs by the witnesses named in the plaintiffs' bill of costs went entirely and exclusively to their claim for damages in respect of the breaches for not keeping the mine in repair and for not properly working the mine,—obtained a rule calling upon the plaintiffs to show cause why the Master should not be at liberty to review his taxation.

Granville Somerset now showed cause.—By not pleading, the defendant admits that something is due upon each breach; and the court will assume that nominal damages ought to have been given. It was necessary to show that there was coal in the mine and that the defendant had been working, or the plaintiffs would have perilled their sleeping rent. The 11th section of the 13 & 14 Vict. c. 61, which deprives a plaintiff of costs in an action brought in one of the superior *623] courts, where he does not recover 20*l.* in an action of contract, and 5*l.* in an action of tort, excepts the case of a judgment by default: where, therefore, the defendant in an action of assumpsit allowed judgment to go by default, and the plaintiff on a writ of

inquiry obtained a farthing damages only, it was held that the latter was entitled to his full costs: *Glynne v. Roberts*, 9 Exch. 253. The case of *Anderson v. Chapman*, 5 M. & W. 483, shows that the declaration is not divisible. There, in assumpsit against carriers by sea, the declaration charged that the defendants had so negligently conducted themselves in and about the stowage and otherwise taking care of and carrying the goods, which were described to be 100 casks of tallow, that they were damaged and spoiled: the defendants pleaded that they did take due care of the goods, and did not negligently conduct themselves in and about the stowage of the goods or otherwise, on which issue was joined: at the trial the plaintiffs failed to prove any negligence in respect of the stowage of the tallow, but proved a damage to one cask from negligence in the loading, as to which alone they obtained damages: and it was held that the defendants were not entitled (under the 7th rule of H. 2 W. 4) to a verdict or costs on the above issue in respect of the rest of the casks. "If," says Lord Abinger, "we were at liberty to do justice in this particular case, in contravention of the general rule of law, I should be much disposed to discharge this rule; because the parties undoubtedly both went down to try the question as to the damage by improper stowage. But the plaintiffs, nevertheless, proved negligence within the terms of the declaration. Now, the effect of the plea is, that the defendants committed no negligence such as is complained of in the declaration: that is the issue: but it appears by the evidence that they have: as soon as that is found, the case resolves itself merely into a question of *damages, and assumes the same form as if [*624 the defendants had not pleaded at all, but had let judgment go by default." The entire issue,—if it may be so called,—is found for the plaintiffs: nothing can be entered for the defendant. In *Feize v. Thompson*, 1 Taunt. 121, it was held, that, if the plaintiff has evidently sustained some damages, and the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages. [WILLES, J.—The same thing was done by the Court of Queen's Bench in *The Queen v. Fall*, 1 Q. B. 636 (E. C. L. R. vol. 41). WILLIAMS, J.—The writ of inquiry is in effect an issue sent to inform the conscience of the court as to what damages the plaintiffs have sustained. The jury do not think fit to inform the court. Under such circumstances, the plaintiffs are entitled to nominal damages.] In *The Queen v. Fall*, Lord Denman says: "The entry of nominal damages in such a case as the present is quite of course, and entirely a matter of form, in which the jury could not exercise any discretion." It is clear, therefore, that, in contemplation of law, nominal damages are to be assumed to have been given.

Murray, in support of the rule.—The declaration contains three breaches,—the first, for liquidated damages; the second and third for unliquidated damages: and it is sworn that the jury expressly found that no damages had been sustained in respect of the second and third breaches: and there is no affidavit in answer. It may be conceded that there are no issues here, properly so called: but, for the purpose of costs, where there are three counts or three breaches,

there are three distinct causes of action. In *Reynolds v. Harris*, 3 C. B. N. S. 267 (E. C. L. R. vol. 91), in slander, the declaration contained four counts: the defendant pleaded not *guilty to the *625] whole declaration, and further to the second count a multifarious plea of justification setting forth three several circumstantial statements of misconduct on the part of the plaintiff, any one of which would be a sufficient answer to the count: the plaintiff took issue on the pleas; and, upon a reference of "all matters in difference in the cause," with a provision that "the costs of the cause, and also the costs of the order and of the reference and award, should abide the event of the award," and that "the arbitrator should have power to direct how the verdict in the cause should be entered,"—the arbitrator found, upon not guilty, for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts; and, as to the second issue, he found that the plea, so far as related to one of the matters justified, was proved, and as to the rest not proved; and, being of opinion that the part proved was an answer to the second count, he assessed no damages for the plaintiff on that count, but assessed his damages on the fourth count at 40s. And it was held that the proper principle of taxation was, to allow the plaintiff no costs of any part of the plea of justification, and the defendant costs only of the part expressly found to be true, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not costs of any evidence applicable exclusively to that part of the plea which was found to be untrue. [ERLE, C. J.—Does the plaintiff lose the costs of witnesses merely because the jury do not choose to believe them?] In *Cocks v. Peachey*, 2 M. & Ry. 420, it was held, that, where the jury, in returning a verdict, say that they find for the plaintiff as to part of the declaration, he will not be allowed the expenses of witnesses called to support a different part, although the verdict be entered for *626] him generally. Cockburn, C. J., *in *Reynolds v. Harris*, 3 C. B. N. S. 291 (E. C. L. R. vol. 91), says: "Quite independent of statute and rule, a discretion ought to be, and is in practice, exercised as to the amount of costs; and useless expenditure ought to be, and is in practice, disallowed. The Master ought to look to the finding upon the issue, where there is nothing else in the proceedings to guide his discretion. But where, as here, there is matter ascertained in the cause,—whether appearing upon the face of the proceedings or established by the statement of the judge founded upon his judicial knowledge of the facts,—whereby the Master is satisfied that witnesses called by the successful party have been wholly useless, and their evidence as completely thrown away as if they had sworn to a truism or an irrelevant fact, he ought to disallow the expenses of such evidence, as at least unnecessary." Instead of taking that view, the Master here, conceiving that the jury ought to have found nominal damages on the second and third breaches, assumed that they had done so. [ERLE, C. J.—The ground you rest upon, is, that the witnesses were disbelieved.] The plaintiffs got no more than they would have got without them. Mr. Gray,—Gray on Costs, 41,—treating of the divisibility of issues, says: "Before discussing this subject further, it will be well to disembarass it of a question which has

been mixed up with it in some of the cases. That question is this: Where the plaintiff, from the issue raised not being divisible, has an entire verdict, and yet at the trial called witnesses for the purpose of proving a more extensive cause of action than he succeeded in proving, those witnesses not having spoken at all to that part of the cause of action which he did succeed in proving, is the plaintiff entitled to be allowed the expense of those witnesses, as he succeeded on the entire issue? *It is very clear that he is not; (a) but that must rest upon entirely different grounds from any question as to the costs of issues. The reason is simply that the witnesses were not material or necessary witnesses, for, *without them, the plaintiff would have recovered precisely the same verdict and debt or damages which he has recovered.*"

ERLE, C. J.—I am of opinion that this rule must be discharged. The defendant suffered judgment by default; and, no doubt, without the plaintiffs calling any witnesses upon the inquiry, the jury would have been bound to give nominal damages; and, if they omitted to do so, the court might rectify the omission at any time. I treat the declaration as consisting of one count only, though it has been contended to be in substance three. Notwithstanding the plaintiffs would have been entitled to nominal damages without them, that does not make the witnesses immaterial. In all cases it is the Master's duty to disallow the expenses of witnesses whom, in the exercise of his discretion, he finds to be immaterial. But, whether witnesses are material or not, does not depend upon the result, but upon this, whether a prudent attorney, having a due regard for the interests of his client, would have brought them. I discharge this rule because the Master did exercise his discretion here as to whether or not the witnesses in question were material and necessary in the sense in which I use the term. I think, however, the rule should be discharged without costs. It was a fair question, and the court rather encouraged the inquiry.

WILLIAMS, J.—I am of the same opinion. I think *this matter is to be looked at as if that had been done which might and ought to have been done, viz. the inquisition amended by adding a finding of nominal damages upon the second and third breaches. That being so, the Master is bound to allow all such witnesses as he conceives to be material and necessary, notwithstanding their testimony has been productive of no fruits.

WILLES, J.—I am of the same opinion. The practice of the court is the law of the court.

KEATING, J., concurred.

Rule discharged.

(a) *Delisser v. Towne*, 1 Q. B. 333 (E. C. L. R. vol. 41); *Cocks v. Peachey*, 2 M. & Ry. 420 (E. C. L. R. vol. 17).

*632] *suitable to *1is degree and estate.* This was laid down by Lord Holt in *Etherington v. Parrot*, Salk. 118, 2 Ld. Raym. 1006: and see *Clifford v. Laton*, 3 C. & P. 15 (E. C. L. R. vol. 14), M. & M. 101 (E. C. L. R. vol. 22); *Ruddock v. Marsh*, 1 Hurlst. & N. 601. This implied authority given by law to the wife is not affected by any private agreement between her and her husband, uncommunicated to the creditor: *Johnston v. Sumner*, 3 Hurlst. & N. 261." Merely telling the wife in private that she shall not pledge the husband's credit, will not destroy the general agency which the law gives her. In *Reneaux v. Teakle*, 8 Exch. 680, the presumption of authority was rebutted by proof that the wife had a sufficient allowance for dress, and consequently the articles supplied were not necessities. In *Reid v. Teakle*, 13 C. B. 627, the matter was hardly contested. [BYLES, J.—It is enough for you to say that there is apparent authority derived from the husband, where the parties are living together, and the goods supplied are necessities. WILLIAMS, J.—The case of an infant differs from that of a wife: in the former case, there is an incapacity to contract, except for necessities: in the latter, it is a question of authority. WILLES, J.—The strongest case against you is *Biffin v. Bignell*, 7 Hurlst. & N. 877, where the Court of Exchequer held, that, where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, although the allowance is inadequate. I do not wish to be understood as making any remark upon that case.] There the husband and wife were living apart by mutual consent: it will not therefore govern this case. The principle of agency is distinctly affirmed in *Johnston v. Sumner*, 3 Hurlst. & N. 261. It was there distinctly held, that, during cohabitation, a wife has an implied authority as agent of her husband to pledge his credit for necessities suitable to her station, *notwithstanding any private agreement between them. Pollock, C. B., in delivering the judgment of the court, says: "We have not to interpret a positive law, but to ascertain the principle on which a husband has been held liable for goods furnished to his wife, and see how far, or whether at all, it applies to this case. Now, the principle seems to be merely that of *agency*: the wife is spoken of as the husband's agent, as having his authority; and the declaration is as upon a *contract by him* through his wife as an agent. The question to be resolved, then, is, had the wife authority to pledge the husband's credit? Now, authority may be express or implied, or arising from conduct, as, where one person holds out another in such a way as to induce a belief of authority; or there may be an authority from necessity, as in the case of a captain of a ship under certain circumstances. If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authorities of a wife." Bearing that principle in mind, there will be no difficulty in arriving at a correct conclusion in this case. As a general rule, an agent is authorized to do all that is usual in the business in which he is employed, and the principal is bound, although the agent may have disobeyed secret instructions. That principle was carried out in the case of *Hawken v. Bourne*, 8 M. & W. 703. Parke, B., there says: "One partner, by virtue of that relation, is constituted a *general agent* for another as to

all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged. Any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses as a *general* *agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made." So, in the case of a warranty on the sale of a horse, given by the servant of a dealer.(a) Can the supposed revocation of the authority of the wife in 1851 affect the plaintiffs, to whom it was never communicated? The judgment of the Court of Exchequer in *Johnston v. Sumner* disposes of that question. In *Holt v. Brien*, 4 B. & Ald. 252 (E. C. L. R. vol. 6), Bayley, J., says: "If a husband makes no allowance to his wife, he gives her a general credit, and she may contract debts for the necessary supply of herself and family, for which he will ultimately be liable: but that proceeds on the ground that, in such a case, she is to be considered as his agent in contracting the debts. But, if he supplies her with a sufficient allowance for the purpose of paying for these necessary supplies, and the tradesman with whom she deals has notice of it, and afterwards trusts her, he does so at his own peril, and will only be entitled to recover by proving that in fact the allowance was not regularly paid." [ERLE, C. J.—That is a very important authority for you.] *Ruddick v. Marsh*, 1 Hurlst. & N. 601, is equally so. It was there held that a wife is the general agent of her husband with reference to such matters as are usually under the control of the wife: where, therefore, the wife of a labourer incurred a debt for provisions for the use of the family, the husband was held liable, though he had supplied his wife with money to keep the house. [BYLES, J.—The creditor not having notice of the fact?] Yes. Lord Holt, C. J., in *Etherington v. Parrot*, Salk. 118, says: "While they cohabit, the husband shall answer all contracts of hers [the wife's] for necessaries; *for, his assent shall be presumed to all necessary contracts, upon the account of cohabiting, unless the contrary appear. But, if the contrary appear, as, by the warning in this case, there is no room for such a presumption." So, in *Montague v. Benedict*, 3 B. & C. 631 (E. C. L. R. vol. 10), 5 D. & R. 532, Bayley, J., says,—“Cohabitation is presumptive evidence of the assent of the husband; and, when such assent is proved, the wife is the agent of the husband duly authorized.” The authority of a servant or housekeeper stands upon a totally different footing: her agency may be put an end to at any time: but the agency of the wife cannot be got rid of so long as the cohabitation continues. Much reliance was placed at the trial upon the defendant's evidence that he had supplied his wife amply according to his means. But he is not to be the judge of that: it is for the jury to say whether the allowance made is sufficient according to the position which the husband chooses to assume. Seeing the station this gentleman occupied, the jury were, it is submitted, well warranted in coming to the conclusion that the

(a) See the cases collected in *Brady v. Todd*, 9 C. B. N. S. 592 (E. C. L. R. vol. 99).

articles supplied here were necessities, and that the allowance paid to the wife was under the circumstances insufficient.

Karslake, Q. C., and Bullen, in support of the rule.—That which is said by the court in *Reneaux v. Teakle*, 8 Exch. 680, is sustained by the older authorities. It was there distinctly held that a husband living with his wife, and who makes her a sufficient allowance for dress, is not liable for dresses supplied to her without his knowledge; and the fact of the wife having, within a particular period, purchased various articles of dress of different tradesmen, is admissible in evidence to rebut the presumption arising from cohabitation of an implied authority to contract for necessary clothing. It was contended there, as it has been *contended here, that “a wife who *636] is living with her husband has an implied authority to pledge his credit for articles suitable to her station.” But Martin, B., said: “That is only a presumption arising from cohabitation, and may be rebutted. The question is one of agency. If a husband tells his wife that he will not permit her to have a particular kind of dress, she cannot bind him by ordering it.” And Pollock, C. B., says: “The apparent result of the authorities is, that, if a tradesman trusts a married woman, he must take his chance of payment.” That is quite consistent with the three leading cases of *Manby v. Scott*, 1 Sid. 109; *Montague v. Benedict*, 3 B. & C. 631 (E. C. L. R. vol. 10), 5 D. & R. 582, and *Seaton v. Benedict*, 5 Bingh. 28 (E. C. L. R. vol. 15), 2 M. & P. 66. In *Bainbridge v. Pickering*, 2 Sir W. Bl. 1325, Gould, J., says,—“If an infant lives with her parent, who provides *such apparel as appears to the parent to be proper*, so that the child is not left destitute of clothes or other real necessities of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessities; for, *no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased or from whom.*” The proper question for the jury in these cases is, whether upon the facts proved the wife had any authority, express or implied, to bind her husband by the contract: *Reid v. Teakle*, 13 C. B. 627 (E. C. L. R. vol. 80). [BYLES, J.—In *Reneaux v. Teakle*, 8 Exch. 680, there was a sufficient supply by the husband: but in *Reid v. Teakle*, there was no evidence of that.] The facts, as set out in the special verdict in *Manby v. Scott*, were these:—Dame Scott, wife of the defendant, Sir Edward Scott, left her husband against his will, and after a time she made demand of cohabitation with her husband, but he refused to receive her: and *637] during the time she was thus absent from her *husband he prohibited several people from supplying her with goods or wares of any kind, and, if they should be supplied, declared that he would not pay for them, and, among others, he specially prohibited the plaintiff, who nevertheless sold the said dame yards of silk and velvet to the amount of 40*l.* (for which this action was brought), which the jury found were necessities suitable to the degree of her husband. The majority of the judges held the defendant not liable: and Wyndham, J., says,—“If the husband shall be bound by this contract, many inconveniences must ensue. 1. The husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the

husband: so it may be said of them as it was by Mowbray, J., 39 Ass. 1, in another case,—‘We see the wife and the defendant here of one mind, to the prejudice of the husband.’ 2. The wife, having the goods, will be more violent in enforcing prosecution than our law permits, an evil which our law guards against. 3. Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey. 4. *It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper.* 5. Wives who think what they have insufficient, will have it tried by a mercer whether their dress is not too mean; and this will make the mercer judge whether he will dispose of his own goods or not.” The judgment of the Court of Queen’s Bench in *Montague v. Benedict*, and that of this court in *Seaton v. Benedict*, clearly show that it is only a question of agency. *Johnston v. Sumner*, 3 Hurlst. & N. 261, has been cited for the purpose of showing that a private arrangement between the husband and the wife cannot be recognised. If it goes to that extent, the case certainly is opposed to all the dicta above referred to, *and is far too uncertain a guide. (a) *Atkins v. Pearce*, 2 C. B. N. [*688 S. 763 (E. C. L. R. vol. 89), is somewhat applicable. There, A. went abroad in 1852, leaving his wife and three children here, with (what the jury found to be) a sufficient provision for their proper maintenance in his absence: on his return in 1856, he found that his wife had formed an adulterous connection with another man, who lived with her, and passed by her husband’s name, and he immediately removed his children. This court held, that, under these circumstances, A. was not liable for medicine and attendance furnished for his children at his wife’s request, although the plaintiff was not aware of the state in which she was living at the time. The facts were held to rebut the implication of agency. [WILLES, J.—In *Norton v. Fazan*, 1 B. & P. 226, which is referred to in that case, the wife was living in the house where the husband left her, and he made no provision for her: and there it was held that he was liable for necessities supplied to her by one who had no notice of the circumstances under which the wife was living.] Upon grounds of public policy, it is submitted, the plaintiffs in this case ought not to be allowed to recover. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of himself, Williams, J., and Willes, J.:—

This was a rule for setting aside the verdict for the plaintiffs, and entering it for the defendant.

The action was for goods sold. Upon the trial the plaintiffs raised a presumption of the defendant’s liability by showing that the goods were ordered by his the defendant’s wife, while living with him, for the *use of herself and children. The defendant rebutted this presumption by showing that he had forbidden his wife to take [*689 up goods on his credit, and had told her that if she wanted money to buy goods, she was to apply to him for it: and there was no evidence that she had so applied and been refused. The plaintiffs proved, in reply, that the goods were necessities suitable to the estate and degree of the defendant; that the wife had 65*l.* per annum to her separate use; and that the defendant had promised to allow her 50*l.* per annum

(a) See the remarks upon this case in 2 Smith’s Leading Cases, 5th edit. 423, 424.

in addition, but had not paid it regularly, and had not supplied her with such necessaries or with money sufficient for the purchase thereof. The plaintiffs also showed that they had received no notice of the defendant's prohibition to his wife against taking up goods on his credit.

These facts are in effect found by the jury: and the question is raised whether the wife had authority to make a contract binding on the husband for necessaries suitable to his estate and degree, against his will and contrary to his order to her, although without notice of such order to the tradesman.

Our answer is in the negative. We consider that the wife cannot make a contract binding on her husband, unless he gives her authority as his agent so to do. We lay down this as the general rule, premising that the facts do not raise the question what might have been the rights of the wife, either if she was living separate without any default on her part towards her husband, or if she had been left destitute by him.

The whole law upon this subject is well collected in the note to *Manby v. Scott* (1 Siderfin 109), 2 Smith's Leading Cases 385 et seq. It is there shown that the general rule is as above stated; and that, *640] where a plaintiff seeks to charge a husband on a contract made *by his wife, the question is, whether the wife had his authority, express or implied, to make the contract; and that, if there be express authority, there is, no room for doubt, and, if the authority is to be implied, the presumptions which may be advanced on one side may be rebutted on the other; and, although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted. So was the decision of the majority of the judges in *Manby v. Scott*; and to that effect are the words of Lord Holt in *Etherington v. Parrot*, 2 Ld. Raym. 1006, 1 Salk. 118: and this doctrine has been sanctioned in the cases which have followed. In supporting this conclusion, our decision does not militate against the rule that the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground.

The plaintiffs contend that the wife has the power above described; and they rely on observations made by judges both in *Manby v. Scott* and in some later cases: but the answer in point of authority is, that the adjudications have not supported the observations on which they rely. In *Manby v. Scott*, those judges were in the minority; and the observations referred to in later cases have not been the ground of any decision. The weight of authority seems to us to be against the plaintiffs.

Then, if we resort to considerations of principle, they lead to the same conclusion.

*It is not our province here to inquire whether it is advisable to give to the wife greater rights. But, taking the law to

be, that the power of the wife to charge her husband is in the capacity of his agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife creates the authority against his will, by a *presumptio juris et de jure* from marriage: and, if it be expedient that the wife should have greater rights, it is certainly inexpedient that she should have to exercise them by a process tending to disunion at home and pecuniary distress from without. The husband sustains the liability for all debts: he should therefore have the power to regulate the expenditure for which he is to be responsible, by his own discretion, and according to his own means. But, if the wife taking up goods from a tradesman can make her husband's liability depend on the estimate by a jury of his estate and degree, the law would practically compel him to regulate his expenses by a standard to be set up by that jury,—a standard depending on appearances, perhaps assumed for a temporary purpose, with intention of change.

Moreover, if the law was clear, that the husband was protected from the debts incurred by the wife without his authority, not only in the ranks where wealth abounds would speculations upon the imprudence of a thoughtless wife be less frequent because less profitable, but also in the ranks where the support of the household is from the labour of the man, and where the home must be habitually left in the care of the wife during his absence at his work, more painful evils from debt which the husband never intended to contract, would be checked.

As we collect from the report of the learned judge that the verdict is for necessities suitable to the estate *and degree of the husband, obtained from the plaintiffs by the wife of the defendant [*642 without his authority and contrary to his order, according to our view of the law this verdict cannot be supported. It follows that the rule for setting it aside and entering a nonsuit should be made absolute.

BYLES, J.(a)—This was an action for goods sold by the plaintiffs, who were drapers at Bath, to the defendant's wife, during cohabitation, for the use of herself and her daughters, being infants, and delivered at the defendant's residence in Wales. The articles were all ordered by the wife, and some of them at the defendant's house, of the plaintiffs' traveller. They were articles of clothing, such as would in ordinary course be used in the defendant's presence, though there was no proof that he observed them. The orders given by the wife to the plaintiffs, were given without the knowledge of the defendant, and against his directions.

The jury found that all the goods supplied by the plaintiffs were necessities, *i. e.* articles suitable and proper for the condition of the wife and daughters of the defendant, who was a country gentleman in Wales; that, before the supply, the husband had revoked his wife's general authority to purchase necessities, promising to make her what, if regularly paid, would have been a sufficient allowance for that purpose, but that the whole of that allowance had not been paid, and that so much of it as had been paid was not sufficient to provide any of the necessary articles supplied by the plaintiffs.

(a) Read by Keating, J., in the absence of Byles, J.

The plaintiffs had no notice of any revocation of the wife's authority. The word "necessaries" is not free from ambiguity. It may import *643] simply things suitable to the *station of the party supplied, without reference to the supply or means of supply from other sources: or it may import things not only suitable, but requisite or indispensable because not supplied from any other source. And these last, again, are divisible into two classes,—those which are indispensable, without any fault of the party supplied,—and those which are indispensable, because the party supplied has wasted supplies or the means of supply from other sources.

In the case now under consideration, the jury have found, in effect, that the goods sold by the plaintiffs to the defendant's wife were necessaries, not only in the first sense, but indispensable, and not only indispensable, but indispensable without any fault or waste of the wife.

The question is, whether a private arrangement between husband and wife limiting her ordinary and apparent authority without notice to the tradesman who has supplied to the wife necessaries in the strictest sense, is an answer to an action by the tradesman against the husband.

I conceive that the power of the wife living *with* her husband to contract for necessaries, rests on the law of principal and agent. It is a part of that law, that, if the principal's representations or acts clothe the agent with an *appearance* of authority larger than the agent really possesses, the principal is bound by the agent's acts within the limits of that apparent authority. The wife's power to bind her husband may therefore repose not merely on her actual authority, but on the *apparent authority with which the husband invests her by cohabitation*. He thereby, as it seems to me, represents her to tradesmen as being within certain limits his domestic manager, and is therefore responsible for her contracts within the margin of that apparent *644] authority. No private revocation of *authority, or private agreement between husband and wife, not communicated to a tradesman honestly dealing with the wife by supplying necessaries for the family in the ordinary course of domestic affairs, can affect the tradesman's right to rely on the apparent authority of the wife.

The judgment of the Court of Exchequer in the most recent case on the subject, the case of *Johnston v. Sumner*, 3 Hurlst. & N. 261, is in conformity with this view of the law, and is, as I conceive, in harmony both with principle and with the old authorities. "The principle," says the court, "is merely that of agency. Authority may be express or implied, or arising from conduct; as, where one person holds out another in such a way as to induce a belief of authority." The court adds, that, "*if a man and his wife live together, it matters not what private agreement they may make, the wife has all the usual authorities of a wife,*"—p. 266.

In the notes to *Manby v. Scott*, 2 Smith's Leading Cases 388, the result of all the authorities, and more particularly of *Etherington v. Parrot*, 1 Salk. 118, 2 Ld. Raym. 1006, is said to be this, "that, during cohabitation, there is a *presumption*, arising from the very circumstance of the cohabitation, of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate." By the word "presumption," the learned author, as appears from the subse-

quent part of the note, means a presumption which the creditor had a right to make, and which could not be repelled by a secret revocation, but only by a revocation communicated to the tradesman. Such was plainly Lord Holt's meaning, in the case of *Etherington v. Parrot*, as may be seen by consulting either report of the case, especially the fuller report in Lord Raymond.

*The expression *presumed* authority, however, though not [645 inappropriate, is ambiguous, and does not appear to me to express so precisely what is meant as the expression *apparent* authority.

The American law and the Scotch law coincide with this view of the case. In Kent's Commentaries, vol. 2, p. 139, the learned author lays it down that the husband is bound by the wife's contracts for ordinary purposes, from a *presumed* assent on his part. The Scotch law is the same. In Bell's Commentaries, vol. 1, p. 676, it is said that "she is empowered as by *presumed* mandate to bind the husband for furnishings to the family."

There are two recent cases which have been cited as at variance with this view of the law,—*Reid v. Teakle*, 13 C. B. 627 (E. C. L. R. vol. 76), and *Reneaux v. Teakle*, 8 Exch. 680: but both those cases are subject to observation. In *Reid v. Teakle*, the case was not argued by the defendant's counsel, but abandoned; and Jervis, C. J., expressed a doubt "whether, if a woman order what is strictly and properly necessary, her husband can repudiate her agency." In *Reneaux v. Teakle*, the court seem to have granted, or at least may have granted, a new trial on other grounds.

I think, therefore, the plaintiffs are entitled to keep their verdict, and that the rule should be discharged.

The opinion of the majority of the court being in favour of the defendant, the rule was made absolute to enter a nonsuit.

Rule absolute accordingly.

*DAKIN v. OXLEY. Feb. 1.

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It is no answer to an action by a ship-owner against the charterer to recover freight, that, by the fault of the master and crew, and their negligent and unskilful navigation of the vessel, the cargo (coal) was damaged so as upon arrival at the port of discharge to be then there of less value than the freight, and that the charterer abandoned it to the ship-owner.

THIS was an action upon a charter-party. The first count of the declaration stated, that, by a certain charter-party, in which the plaintiff was described as Captain George Dakin, of the British good ship or vessel called the *Contest*, it was mutually agreed by and between the plaintiff and defendant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should without any delay sail and proceed to Newport, Monmouthshire, and there take on board in the usual and customary manner from the factors of the defendant a full and complete cargo of coals, which was to be brought to and taken from alongside at merchant's risk and expense, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, including a sufficient supply of coals for ship's use during the voyage, which the plaintiff bound

if the deterioration has proceeded from natural decay, or from the great diminution of price that takes place at the end of particular seasons, as in figs, grapes, and herrings, after Easter; or by reason of an over-abundant supply of the market, as in corn, wine, or salt, although in salt a different practice formerly prevailed, which is contrary to reason, if the option has not been reserved by an express clause in the charter-party:’ Guidon, ch. 7, art. 7, 10. In the very next article (11), however, of the treatise, we find this doctrine,—‘If goods contained in casks, as wine, oil, olives, molasses, and others of the like sort, have leaked to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight before they are landed. Therefore, masters should take care, when they receive casks, to see that they be well hooped, and in good condition. It is true, that, if, by tempest, the casks have been so pressed that they have thrown out their bottoms, have been beaten in, and burst, provided there have been no fault in the stowage, the loss shall be an average against the insurers, the master shall lose his freight.’ From the words of this article

*651] it appears very clearly, that in the opinion of the author, the merchant might abandon articles of this description, although the leakage were not occasioned by perils of the sea. In the work of Molloy, however (Book 2, c. 2, § 14), we find the following clauses: ‘If freight be taken for one hundred tons of wine, and twenty of them leak out, so that there is not above eight inches from the bulge upwards, yet the freight becomes due: one reason is, because from that gauge the King becomes entitled to custom; but, if they be under eight inches, by some it is conceived to be then in the election of the freighters to fling them up to the master for freight; and the merchant is discharged. But most conceive otherwise; for, if it had all leaked out (if there was no fault in the master), there is no reason the ship should lose her freight, for the freight arises from the tonnage taken: and, if the leakage was occasioned through the storm, the same perhaps may come into an average. Besides, in Bordeaux, the master stows not the goods, but the particular officers appointed for that purpose; quod nota. Perhaps a special convention may alter the case.’ The French Ordinance^(a) declares ‘that the merchant shall not oblige the master to take for his freight goods diminished in price, spoilt, or deteriorated by their own vice or by the peril of the sea.’ And the very next article is as follows,—‘If goods put into casks, as wine, oil, honey, or other liquors, have leaked out to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight.’ Valin, in his commentary on this last article, observes, that it is taken from the article of the Guidon which I have just before quoted. He observes also, that, by the Consolato

*652] del Mare, ch. 202, the contrary is *decided; yet that, by another article of the same code, ch. 234, freight is not due for pottery unless it is found entire at the end of the voyage: and he considers this article of the ordinance to give the right of abandonment to the merchant in the case of leakage happening as well from the fault of the casks as from the perils of the sea, and to be an exception to the general rule laid down in the article immediately preceding.

(a) Liv. 3, tit. 3, Fret, art. 26 and 28. Those articles are repeated in the Code de Commerce, art. 310.

On the other hand, his countryman, Pothier, controverts this opinion, and contends that the article of the ordinance is to be confined to the case of leakage occasioned by peril of the sea; in which case he considers the real commodity, viz. the contents of the casks, to be absolutely lost, as much as if they had been washed overboard. 'This opinion of M. Valin,' says he, 'appears to me to be contrary to principles. It is the fault of the merchant if he has put his goods into bad casks: it is *his* fault if they have leaked out, and have not arrived at the place of destination. He therefore ought to pay the freight; for, according to the principles of the contract of hiring, the hirer who by his own act or fault has not enjoyed the thing let to him, ought to pay the hire as if he had enjoyed it. If the lettor, who has been prevented from letting to other persons the part of his vessel occupied by the bad casks, should not be paid the freight, he would suffer for the fault of the hirer, which is unjust.' *Traité de Charte-partie*, num. 60. This argument of Pothier may show what *ought* to have been established by the ordinance, but it by no means proves that the interpretation given by Valin, and which agrees with the terms of the Guidon, is not the true interpretation. The rule was probably introduced in early times, to prevent disputes and litigation; and adopted by the framers of the French Ordinance for the same reason." In 3 Kent's Commentaries 224 (10th edit. 313), it is *said: "When [653 the goods become greatly deteriorated on the voyage, it has been a very litigated question whether the consignee was bound to take the goods and pay the freight, or whether he might not abandon the goods to the master in discharge of the freight. Valin and Pothier entertained opposite opinions upon this question. The former insists that the regulation of the ordinance, holding the merchant liable for freight on deteriorated goods, without the right to abandon them in discharge of the freight, is too rigorous to be compatible with equity. He says the cargo is the only proper fund and pledge for the freight, and that Casaregis (Disc. 22, n. 46, and Disc. 23, n. 86, 87) was of the same opinion. Pothier, on the other hand, was against the right of the owner to abandon the deteriorated goods in discharge of the freight; and this is the better opinion, and the one adopted in the case of *Griswold v. The New York Insurance Company*, 3 Johns. 321. It is in accordance with the Ordinances of the Marine, and of Rotterdam, and with the new commercial code of France: and the latter puts an end to all further doubt and discussion on the subject in France. The shipowner performs his engagement when he carries and delivers the goods. The right to his freight then becomes absolute, and the carrier is no more an insurer of the soundness of the cargo as against the perils of the sea, or its own intrinsic decay, than he is of the price in the market to which it is carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of the value of the cargo. It may impair the remedy which his lien afforded, but it does not affect his personal demand against the shipper." In *Parsons on Maritime Law*, 215, it is said: "It has been made a question whether, at the port of ultimate destination, if the goods arrive [654 *so injured as to have lost their mercantile value, the shipper may not then abandon them to the master and pay no freight. We

consider it, however, quite settled as the law of this country (America), that, if the goods arrive in specie, the shipper must pay freight for them, whatever be their condition or value. If that value has been lost or diminished by the fault of the master, or without his fault, but from a cause for which he is responsible, then, as we have repeatedly said, the shipper may claim compensation; but he must pay freight." Reference is made in a note to the case of *Luke v. Lyde*, 2 Burr. 882, 887, for a dictum of Lord Mansfield to the effect that the merchant may by abandonment excuse himself from freight: but it is said that that doctrine has not been followed in America. The same view is adopted in *Benecke on Marine Insurance* 13. The underwriter on freight is not bound to pay if the goods arrive in specie, though deteriorated, because the freight is not in that case lost. The court will only have recourse to foreign codes and to foreign jurists to aid their judgment where there is no common-law principle to guide them. But here there is a common-law principle, viz. that the merchant shall pay freight; and that, if the goods have through any negligence or default on the part of the master or crew become deteriorated, he has his remedy by a cross-action. The principle before adverted to, which allows a defendant in an action for the price of goods, or for work and labour, to show that the goods or the work were by reason of the plaintiff's default of decreased value, is said by Parke, B., in *Mondel v. Steel*, 8 M. & W. 858, 871, not to have been extended to an action for freight,—*Sheels v. Davies*, 4 Campb. 119. And see *Allen v. Cameron*, 1 C. & M. 832. In *Parsons on Contracts* *655] 388, it is said: "Perhaps no better rule can be *given, than that, if the thing to be done be in its own nature separable and divisible, and there be no express stipulation or necessary implication which makes it absolutely one thing, and that part which fails may be regarded, to use the language of the court in one case (*Lucas v. Godwin*, 3 N. C. 746, 4 Scott 502), 'not as a condition going to the essence of the contract,' in such case the failure does not destroy the rights growing out of the performance of the residue. But the other party may have his claim or action for damages arising from such failure." To hold such a plea as this to be good, will unsettle the whole law upon the subject.

Brett, Q. C., *contra*.(a)—The point now before the court is entirely new, and has never yet been decided in any court. The plea is framed *656] upon the views *suggested in *MacLachlan on Shipping*, p. 398 et seq. [*WILLES, J.*—Does this plea raise the question? It

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That, where the goods are so deteriorated from the fault of the master or mariners during the voyage as not to be worth the freight, the merchant is entitled to abandon the goods, and is absolved from payment of the freight:

"2. That, where there is such a degree of deterioration from such a cause, the shipowner has so completely failed in the fulfilment of the contract upon which freight is claimed, that, if the merchant refused to receive the goods, no freight is payable:

"3. That, in such a case, it is clear that the merchant can derive no benefit whatever from the conveyance of the goods; but, in order to exclude any presumption or possibility of benefit, he abandons the goods for the freight:

"4. That, in such a case, the shipowner, although not able to enforce the claim for freight against the merchant, is not bound to part with the goods without payment of the freight; and the effect of the abandonment is, to exonerate the shipowner from the keeping or delivery of the goods, and to place them absolutely at his disposal."

does not allege that the cargo was not of mercantile value when the ship arrived at Nassau; but merely that it was of less value than the amount of the freight.] It is not denied, that, if any part of the cargo is accepted, any claim which the shipper may have in respect of negligence of the master and mariners must be the subject of a cross-action; nor is it contended, that, if any part of the goods arrive in specie so as to entitle the shipowner to freight, the underwriters on freight would be liable, or that, if the cargo has sustained injury through the negligence of the master and mariners to an extent short of rendering it worthless, the shipper would be excused from payment of freight. But the allegations in this plea go to show, that, in a mercantile sense, the cargo had through the negligence and mismanagement of the master and mariners become of no value. [WILLES, J.—It is in effect a plea of evidence. That evidence may or may not sustain the allegation that the cargo became valueless.] It could not probably have been alleged here that the cargo,—coals,—had been rendered *utterly valueless*. [WILLIAMS, J.—Is it not consistent with this plea that the coals were worth 253*l.* 2*s.* 6*d.*, and that they were damaged to the extent of 6*d.*?] If that were so, the adventure has become worthless. Unless the merchant can sell the cargo for the cost-price plus the freight and charges, the adventure is lost. And, if that result is brought about by the negligence of the master and crew, why is he to pay freight? The allegation as to the abandonment was merely put into the plea for the purpose of negating the acceptance of part of the cargo. In Maclachlan, p. 398, it is said,—“It may happen that goods existing in specie when brought to the place of destination, are so deteriorated in condition as not to be worth the freight; and then arises the question whether [657 the merchant is bound to pay freight, or is at liberty to abandon the goods to the shipowner for his claim. Upon this question, although different doctrines have prevailed among jurists, there is no judicial decision as yet in our books. In considering it, the causes from which the deterioration in the merchandise may proceed, should be distinguished. If it proceeds from the fault of the master or mariners, the merchant is entitled to a compensation, and may recover it by an action at law against the owners or master; but, if he has received the goods, he cannot insist upon the damage as a defence to such an action brought against himself for the freight,—even although he has offered to return them.” The learned author, after referring to *Garrett v. Melhuish*, 4 Jurist, N. S. 943, proceeds,—“On the other hand, if it proceeds from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of a ship, the merchant must bear the loss and pay the freight; the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event.” He then refers to *Le Guidon*, c. 7, articles 10 and 11, the *Consolato del Mare*, cc. 160, 192, *Molloy*, Book 2, c. 4, § 14, *Valin*, liv. 3, tit. 3, art. 26, *Pothier*, *Traité de Charte-partie*, No. 60, and to the Ordinance of Rotterdam, and says,—“To the same effect Lord Mansfield, in *Luke v. Lyde*, 2 Burr. 882, 887, is reported to have said, that, ‘as to the value of the goods, it is nothing to the master whether the goods are spoiled or not, provided the merchant takes them: it is

enough if the master has carried them; for, by doing so, he has earned his freight; and the merchant shall be obliged to take all that are saved, or none; he shall not take some, and abandon *658] the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons, he is excused freight; and he may abandon all, though they are not all lost.' But this must be received as an extra-judicial opinion of his Lordship, as the question of abandonment was not in issue in that cause: in fact, the goods had not been carried to the place of destination, but the vessel, which was bound for Lisbon, having been captured, and re-captured, was carried with the goods into a port in Devonshire, and there the merchant received them. In *Lutwidge v. Gray*, cited in *Luke v. Lyde*, it seems to have been taken for granted by the counsel on both sides that the merchants might have abandoned the whole cargo: but, in that case, the ship was wrecked, and the goods saved at great expense, at a place short of the port of delivery; and the right of abandonment is spoken of with reference to the situation of the goods at that place. Most certainly, the merchant cannot be compelled to accept his goods at any other place than the place of destination: even if the master should pay the salvage, and convey them to that place, the merchant may be allowed to have his option of accepting them or not, loaded with the additional expense of salvage. And accordingly, in another case (*Baillie v. Moudigliani*, 1 Park Ins. c. 2, p. 116), Lord Mansfield said, 'The owner of the ship has a lien for freight; but, in a total loss, literally so called, no freight is due; in case of a loss total in its nature, with salvage, the merchant may either take the part saved or abandon.' He then refers to *Griswold v. The New York Insurance Company*, 3 Johns. 321, which seems to show, that, by the American law, where any part of the cargo arrives in specie, the rest being destroyed or worthless through no default of the master and crew, the merchant must pay *659] freight. But, *add the fact that the loss arose from negligence of the master and crew, and the case would be different. [WILLES, J.—*Griswold v. The New York Insurance Company*, was cited by Mr. Quain in *Blasco v. Fletcher*, 14 C. B. N. S. 147 (E. C. L. R. vol. 108), and also a subsequent case of *M'Gaw v. Ocean Insurance Company*, 23 Pickering 405, where Chief Justice Shaw, speaking of the cases where the shipowner is entitled to freight notwithstanding the ship has been compelled to put into an intermediate port to refit, says,—"Nor does it make any difference, if the cargo is damaged and unfit to be shipped, if it remains in specie, and can be carried to the port of destination; as the shipowner is not responsible for the damaged condition of the goods, whether such damage arise from a principle of internal decay or from perils of the sea. In such cases, it is held, that, as between the shipper and shipowner, the latter is entitled to his freight *although the goods have become utterly worthless*, and that he has his remedy for his freight, not only by a lien upon the goods (which in the case supposed would avail him nothing), but also by an action against the shipper on his contract of carriage." Those cases, however, leave untouched the present question.] The reasoning in those cases almost necessarily implies that the present argument is founded. [WILLES, J.—Where the cargo has become utterly

worthless. But, is this such a case?] Not if that expression is to be understood as importing the utter annihilation of the article. In *Roux v. Salvador*, 1 N. C. 526, 1 Scott 491 (in error, 3 N. C. 266, 4 Scott 1), the hides, though useless as hides, would be worth something for manure. The authority of Parsons on Maritime Law and Benecke on Insurance carries the matter no further: and *Mondel v. Steel*, 8 M. & W. 858, depends upon a principle which is wholly inapplicable here. Here, the basis of the plea is, that the service has become wholly useless through negligence.

**Cohen*, in reply.—The dictum of Lord Mansfield in *Luke v. Lyde* is admitted to be extra-judicial; and it has never been adopted. In *MacLachlan* 408, it is said: "Mr. Abbott, in his work on Shipping (see Abbott, 8th edit. 430–433), without expressly stating, seems to indicate, an opinion unfavourable to the existence of any such right in the merchant to abandon his goods for the freight; and, for the reasons offered by Pothier on the general rule, it is scarcely doubtful that, within the same limits, the law of this country will be found to be the same as the French law: but, in the absence of express contract, or established usage, or positive enactment, it is hardly probable that the exceptional French rule with regard to liquids will be followed by the English decisions, when any of the liquid remains, or even the cask is entire,"—citing *Davidson v. Gwynne*, 12 East 381; *Shields v. Davis*, 6 Taunt. 65, and *Garrett v. Melhuish*, 4 Jurist, N. S. 943. It is unnecessary on the present occasion to argue that the plea would have been a bad one, if it had alleged that the damage resulting from the negligence of the master and crew exceeded the amount of the freight.

ERLE, C. J.—We do not feel much doubt. But, as the matter is one of general importance, we will examine the authorities referred to, and give our judgment on a future day. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court: (a)—

This is an action by shipowner against charterer to recover the freight of a cargo of coal carried from Newport to Nassau.

*The first count is upon the charter-party. The second is [661 the common count for freight. The defendant pleads, that, by the fault of the master and crew, and their unskilful and negligent navigation of the vessel, the coal was damaged so as upon arrival at the port of discharge to be then there of less value than the freight, and that he abandoned it to the shipowner. The plea, as it does not deny, admits that the cargo arrived as coal, and that it was of some value. The plaintiff demurs: and the question for us to consider is, whether a charterer whose cargo has been damaged by the fault of the master and crew so as upon arrival at the port of discharge to be worth less than the freight, is entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner. We think not: and we should not have taken time to consider, but for the general importance of the subject, and of its having been suggested that our law was silent upon this question, and that the plea was warranted by the usage and law of other maritime countries, which, it was said, we ought to adopt.

(a) The judges present at the argument were, Erle, C. J., Williams, J., Willes, J., and Keating, J.

The principal foreign authorities upon the effect of damage to the cargo upon the right to freight, are referred to in Abbott on Shipping, Part IV, Ch. IX, pp. 324, et seq. of the 10th edition, by Serjt. Shee. The ancient and modern French laws are stated and discussed in Boulay-Paty, Cours de Droit Maritime, vol. 2, pp. 484 et seq. The Spanish law is to be found in articles 787 to 790 of the *Codigo de Comercio*, and in de Bacardi's *Diccionario del Derecho Maritimo*, title "Fletamento." The law of the United States is laid down in 1 Parsons on Maritime Law 172, n.

The continental authorities are not altogether consistent with one another; and, in so far as they tend to sanction this plea, they seem to have been founded upon two notions,—first, that the cargo is the *662] sole *and exclusive security for the freight, to which the ship-owner ought to be contented to look, and by abandoning which the merchant ought to be allowed to free himself from any responsibility,—and second, that, in the case of culpable damage, the freight is forfeited. The first of these propositions was maintained by some even in the case of fortuitous damage (2 Boulay-Paty, 484 et seq.; Casaregis de Commercio, Discursus xxii. p. 60, No. 46): and it has even been insisted, but unsuccessfully, that it applied to the case of undamaged goods, (Gilbert's Code de Commerce, note 3 to Article 310, p. 139 of the edition of 1852). This doctrine, as applied to fortuitous damage, must, however, now be considered as exploded, upon the plain ground that a contract to pay for the carriage of a thing in money cannot be satisfied by a cession of the thing itself in a damaged state to the carrier, against his will.

With respect to goods damaged by the fault of the master, it has also been laid down in general terms, in conformity with the second of the governing ideas already stated, that the master, besides being liable for the damage, shall lose his freight. This was the law of the Hanseatic League (2 Pardessus's Collection of Ancient Maritime Codes, p. 550), and of other commercial nations: 1 Casaregis de Commercio, Discursus xxiii. Nos. 85 to 89, p. 66.

Casaregis, besides being one of the best of the commercial lawyers who wrote before the introduction of the modern codes, has given in his elaborate work, references to the more ancient writers; and we content ourselves with referring to his summary of the law as then understood upon the continent. He was born at Genoa in 1670, and died in 1737, after having been for more than twenty years a judge of the Rota of Florence.

*663] In one of the passages last referred to, that great *lawyer (No. 85) first states that the effect of culpable damage was to work a forfeiture of freight,—"*Non solum tenetur navarchus ad emendationem damni ejus dolo, vel culpa mercibus obventi, * * * sed mercedem sive nautum etiam prætereundum non potest.*" Here the doctrine of forfeiture is clearly asserted; and the same in No. 16 of the same discourse.

The author then proceeds to state, that, where damage is occasioned by accident, without fault, the merchant may abandon if he thinks proper,—"*Adverte tamen quod si merces corruptæ vel vitiatæ fuerint ob casum fortuitum, non culpa navarchi, mercator tenebitur integrum nautum solvere, vel si ei non intererit integrum nautum solvere*"

poterit loco nauli merces relinquere, et ratio est quia naulum debetur proper merces."

He then goes on to state, upon the authority of Targa, that this only applies in favour of the consignee, and not of the charterer of the entire ship, who is bound by his contract to pay the stipulated freight upon the arrival of the goods,—"*Id procedit in mercatore, cui consignandæ sunt merces à navi conductæ, secus in naulizatore totius navis, quia ille indistinctè tenetur semper naulum conventum pro tota navis locatione solvere. Targ. Ponder. Marit. c. 84, § per li noli.*"

Moreover, he adds, that, in the case of culpable damage, it is not competent to the merchant to abandon the cargo to the shipowner and claim the whole value, except where the goods are reduced to a state of uselessness or nearly so: clearly showing that the right of abandonment in such a case affected the amount of damages, and not the freight. In No. 89, citing John de Hævia, a Spanish writer of repute, Casaregis expressly says,—"*Non autem est in electione dominorum mercium, aut recipere res deterioratas et petere damnum, vel eas relinquere magistro et petere ut solvat *pretium, sed illas præcisè recipere debent, et petere à magistro damnum, quod* [*664 *passæ fuerint, præterquam si hujusmodi damnum esset inutile, quia ferè res redactæ fuerint ad inutilitatis statum, tunc enim illas relinquere poterunt et simul pretium ab eo petere, ad latè tradita per Hæviam de Commercio Navale, c. 12, n. 38.*"

It should seem, therefore, that the notion of the cargo being the sole security in case of fortuitous damage, and that of forfeiture of freight by culpable damage, neither of which is consistent with the principles of our law of contracts, was the prevailing idea amongst those lawyers who held abandonment to be a satisfaction of freight; and that it was not a condition in their laws that the cargo should be worth less than the freight, although practically it was only in such a case, or where he wished to get rid of a troublesome adventure, that the merchant would with his eyes open exercise the right to abandon.

We have to add that the law of the United States is unfavourable to this plea. Professor Parsons, in his learned work upon Maritime Law, Vol. I, p. 172, lays down as the rule of those states, that if the cargo arrives in specie, notwithstanding that it is damaged, whether fortuitously or culpably, so as to be worthless, the freight is earned, although, in case of culpable damage, set-off is allowed. This allowance of set-off, it must be observed, affects procedure only; so that we could not adopt it even in the case of a contract made where such law prevails. Indeed, in this case a set-off could not avail the defendant; for, the damage is not alleged to have been equal to the freight.

It ought to be borne in mind, when dealing with such cases, that the true test of the right to freight, is, the question whether the service in respect of which the freight was contracted to be paid has been *substantially performed; and, according to the law of [*665 England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in

respect of the part carried unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight,—a case which has not within our experience arisen in practice.

As to freight *pro ratâ itineris*, in respect of goods accepted, and their future carriage waived, at an intermediate port, it becomes due, not under the charter-party, but by a new contract inferred from the conduct of the parties, so that we need not stop to discuss it. It was in such a case that Lord Mansfield in *Luke v. Lyde*, 2 Burr. 882, 1 W. Bl. 190, said that the merchant, "if he abandons, is excused freight, and he may abandon all though they are not all lost." This is correct, if, instead of "abandon" be read "decline to accept," because it is clear, that, where the goods have not been carried all the way, the merchant need not, in order to prevent a liability for freight *pro ratâ*, give up the property to the shipowner; and abandonment, in maritime law, involves a giving up of the property.

Little difficulty exists in applying the above test where the cargo upon arrival is deficient in quantity. Where the cargo, without loss or destruction of any part, has become accidentally swelled (*Gibson v. Sturge*, 10 Exch. 622), or, perhaps, diminished, as, by drying (Jacobsen's Sea Laws, Book 3, Ch. 2, p. 220), freight (usage of trade *666] apart) is payable upon the quantity *shipped,(a) because that is what the contract refers to. The Spanish Code of Commerce makes a distinction between decrease and increase. Article 787 provides that the entire freight shall be due for goods which are deteriorated or diminished by accident without fault (*caso fortuito*), by intrinsic defect, or by the bad quality and condition of the packages. On the other hand, article 791 enacts, that, if the merchandise is increased in bulk or weight by natural causes, the merchant shall pay freight in proportion to the excess.

In the case of an actual loss or destruction by sea damage of so much of the cargo that no substantial part of it remains; as, if sugar in mats, shipped as sugar and paying so much per ton, is washed away, so that only a few ounces remain, and the mats are worthless, the question would arise whether practically speaking any part of the cargo contracted to be carried has arrived. Such a case seems to be within the principle of the French Ordinance and the second clause of Art. 310 of the Code de Commerce, though they are both in terms confined to the case of liquids where all or nearly all has leaked out, so as to include molasses, but not sugar. Pothier, "*Sur la Charte-partie*," § 60 (4th Vol. of Pothier's Works by Bugnet, p. 404), deals with these as cases in which the thing contracted to be carried has perished before arrival. The Spanish Code of Commerce, Art. 790, after enacting that the shipowner cannot be compelled to receive the cargo, whether damaged or not, in payment of the freight, arbitrarily lays down, as to liquids, of which more than half has been lost, that the merchant may abandon the rest for the freight. A reference to these provisions is enough to show that the task of finding an uniform rule in modern commercial law is at present impossible.

*667] *Where the quantity remains unchanged, but by sea-damage the goods have been deteriorated in quality, the question of identity arises in a different form, as, for instance, where a valua-

(a) See *Shand v. Grant*, ante, p. 324.

ble picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken sherds, iron all or almost all rust, rice fermented, or hides rotten.

In both classes of cases, whether of loss of quantity or change in quality, the proper course seems to be the same, viz., to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived.

If it has arrived, though damaged, the freight is payable by the ordinary terms of the charter-party; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage in a distinct proceeding for such damage against the ship captain or owners. There would be apparent justice in allowing damage of the latter sort to be set off or deducted in an action for freight; and this is allowed in some (at least) of the United States,—1 Parsons on Mercantile Law 172, n. But our law does not allow deduction in that form; and, as at present administered, for the sake perhaps of speedy settlement of freight and other liquidated demands, it affords the injured party a remedy by cross-action only: *Davidson v. Gwynne*, 12 East 381; *Stinson v. Hall*, 1 Hurlst. & N. 831; *Sheels (or Shields) v. Davies*, 4 Campb. 119, 6 Taunt. 65 (E. C. L. R. vol. 1); the judgment of Parke, B., in *Mondel v. Steel*, 8 M. & W. 858; *The Don Francisco*, 32 Law J., Adm. 14, per Dr. Lushington. It would be unjust, and almost absurd, that, without regard to the comparative value of the freight and cargo when uninjured, the risk of a [*668 mercantile adventure should be thrown upon the shipowner by the accident of the value of the cargo being a little more than the freight; so that a trifling damage, much less than the freight, would reduce the value to less than the freight; whilst, if the cargo had been much more valuable and the damage greater, or the cargo worth a little less than the freight and the damage the same, so as to bear a greater proportion to the whole value, the freight would have been payable, and the merchant have been put to his cross-action. Yet this is the conclusion we are called upon by the defendant to affirm in his favour, involving no less than that that damage, however trifling, if culpable, may work a forfeiture of the entire freight, contrary to the just rule of our law, by which each party bears the damage resulting from his own breach of contract, and no more.

The extreme case above supposed is not imaginary; for, it has actually occurred on many occasions, and notably upon the cessation of war between France and England in 1748, which caused so great a fall in prices that the agreed freight in many instances exceeded the value of the goods. The merchants in France sought a remission of freight or the privilege of abandonment, but in vain. (2 Boulay-Paty, Cours de Droit Commercial 485, 486.)

It is evident enough from this review of the law that there is neither authority nor sound reason for upholding the proposed defence. The plea is naught, and there must be judgment for the plaintiff.

Judgment for the plaintiff.

*669] *MORGAN and Another, Assignees of GEORGE KNIGHT,
a Bankrupt, v. CHARLES KNIGHT. Jan. 20.

A second fiat against a trader who has not obtained his certificate under the first, is not void. Therefore, the assignees under the second fiat may maintain an action against a third person for the conversion of property acquired by the bankrupt after the date of the first fiat,—the assignees under the first fiat not intervening.

THIS was an action brought by the plaintiffs as assignees of George Knight, a bankrupt, to recover the value of certain furniture and fixtures which were claimed by the plaintiffs as part of the bankrupt's estate.

The cause was tried before Bramwell, B., at the last Summer Assizes at Lewes. The facts which appeared in evidence were as follows:—George Knight, who carried on business at Brighton, became bankrupt in the year 1850, but did not obtain a certificate. He, however, continued to trade; and in the months of February, March, and April, 1862, he obtained from tradesmen in Brighton the goods in question, for the purpose of furnishing a house and shop at Worthing for his son, the present defendant, of which house and shop the latter had taken a lease. The parties by whom the goods were supplied drew bills upon George Knight, which were dishonoured and renewed: and ultimately, in November, 1862, George Knight again became bankrupt. He afterwards went to reside at Worthing; but did not reside at his son's house. The son's name was over the door; and it did not appear that the father exercised any control over the property there.

On the part of the plaintiffs, it was submitted that the transfer of the goods to the son was a fraudulent transfer, and void.

For the defendant, it was attempted to be shown that he had paid his father for the goods; but this was negatived by the jury. It was then contended on the part of the defendant, that the plaintiffs had no
*670] *right to recover; for, that, George Knight being an uncertificated bankrupt at the time of the adjudication under which they were assignees, all his property both present and future was vested in the assignees under his former bankruptcy, and the latter bankruptcy was void.

It did not appear that the assignees under the first fiat against George Knight made any claim.

The learned judge directed the verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter it for them for 100*l.*, if the court should be of opinion that they were in a position to maintain the action.

Lush, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.—He submitted that an uncertificated bankrupt might possess property until his assignees interposed; and that it was not competent to a wrongdoer to set up the *jus tertii*. He referred to *Herbert v. Sayer*, 5 Q. B. 965 (E. C. L. R. vol. 48), *Dav. & M.* 723, and *Re Bissell's Trust*, 25 Law J. Chan. 323.

Montagu Chambers and *Prentice*, on a former day in this term showed cause.—The question is, whether after-acquired property of an uncertificated bankrupt can be made the subject of an action at the

suit of the assignees under a second fiat. It is submitted that it cannot. The second fiat is altogether void, and no property passes to the assignees under it. By the 1 & 2 W. 4, c. 56, s. 25, it was enacted, that, "when any person hath been adjudged a bankrupt, all his personal estate and effects, *present* and *future*, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any **deed of assignment* for that purpose, as fully to all intents as if such estate and [*671 effects were assigned by deed to such assignees and the survivor of them:" and the 141st section of the 12 & 13 Vict. c. 106, in even more extensive language, enacted, that, "when any person shall have been adjudged a bankrupt, all his personal estate and effects, *present* and *future*, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment." In *Till v. Wilson*, 7 B. & C. 684 (E. C. L. R. vol. 14), 1 M. & R. 580, it was distinctly held that a second commission issued against a trader before a former commission has been disposed of, is a nullity. [WILLES, J.—All the authorities are collected in *Herbert v. Sayer*, 5 Q. B. 965 (E. C. L. R. vol. 48), D. & Meriv. 728.] In *Nelson v. Cherrill*, 1 M. & Scott 452, 8 Bingh. 316, Tindal, C. J., says: "It appears to me that, so long as the decisions in the Court of King's Bench and in this court remain upon the books, a second commission, pending a first, is void in point of law. I am therefore of opinion that the second commission in this case conferred no rights upon these defendants, and consequently that the plaintiff was entitled to recover. It seems that the plaintiff was in the actual possession, and had the apparent right to these goods; and that the defendants seized them under a supposed authority vested in them by virtue of the second commission. That commission being void, they have taken the goods without any authority. The only question then is, whether the **defendants* can be permitted to set up the rights of a third person, in order to defeat the action. [*672 I think that would be admitting a trespasser to clothe himself with rights which the law does not allow him." The like was held by Lord Eldon in *Ex parte Brown*, 1 Ves. & B. 60: and see *Ex parte Proudfoot*, 1 Atk. 252; *Ex parte Storks*, in re *Evans*, 2 Rose B. C. 179, and *In re Chambers*, 8 Mont. & Ayr. 294, 2 Deacon 394. [WILLES, J.—Have the creditors of an uncertificated bankrupt no right to come upon goods left in the order and disposition of the bankrupt after a first fiat?] The property is in the first assignees.

Hannen and Willoughby, in support of the rule.—The cases where the second commission has been held to be void have been mostly cases where the bankrupt has been seeking to rely upon the certificate obtained by him under the second commission. They clearly afford no guide for the decision of this case. [WILLES, J.—In *Butler v.*

Hobson, 4 N. C. 290, 5 Scott 824, it was held that goods allowed to be in the order and disposition of a bankrupt as reputed owner, by the consent of his assignee, are liable to be seized, upon a subsequent insolvency, by the assignee of the Insolvent Debtors Court.] The effect of the decision in *Herbert v. Sayer* is, that the bankrupt, notwithstanding the absence of a certificate under the first fiat, has a qualified right of possession at all events of personal estate subsequently acquired, and may maintain actions in respect of it until his assignees intervene. In *Drayton v. Dale*, 2 B. & C. 293 (E. C. L. R. vol. 9), 3 D. & R. 584, to assumpsit by the endorsee against the maker of a promissory note payable to A. B. or his order, the defendant pleaded,—first, non assumpsit,—secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to endorse the promissory note before the *673] time of endorsement became vested in the assignees, whereby the endorsement by A. B. was void, and created no right in the plaintiff to sue. The plaintiff replied to the last plea, that the endorsement was made with the consent of the assignees. The rejoinder took issue upon that fact: and, a verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment on the whole record,—first, because the defendant, who had made the note payable to A. B. or his order, was estopped from saying that A. B. was not competent to make an order,—secondly, because the property acquired by a bankrupt subsequently to his bankruptcy did not absolutely vest in the assignees, though they had a right to claim it; but, if they did not make any claim, the bankrupt had a right to such property against all other persons.^(a) So, in *Laroche v. Wakeman*, Peake N. P. C. 140, it was held, that, if an uncertificated bankrupt carry on trade, and sell a vessel to A., he has a good title against all persons but the assignees. In *Fyson v. Chambers*, 9 M. & W. 460, it was held that a party who had taken possession of the goods of an intestate after his death, could not set up as a defence to an action of trover by the administrator, that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees; the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them. There, Chambers was a mere wrongdoer, as the defendant is here. That case is a direct authority. It has frequently been referred *674] to with approbation, and has never been impeached. In Chitty on Pleading, vol. 1, p. 29, it is said that “the bankrupt is in several instances allowed to sue in his own name in respect of property acquired and contracts made by him after the bankruptcy and before he has obtained his certificate; for, although the appointment of the assignees vests in them all property which may accrue in any way to the bankrupt before he obtains his certificate, it has been determined in many cases that such property does not vest *absolutely* in the assignees, although they have a right to claim it; but, if they forbear from making any claim, the bankrupt has a right against all other persons, and may maintain actions accordingly.” In *Ex parte*

(a) *Drayton v. Dale* was decided prior to the passing of the 6 G. 4, c. 16.

Butler, In re Bakewell, 2 M. D. & De Gex 731, an assignee under a second commission, under which the bankrupt obtained his certificate, but did not pay 15s. in the pound, lay by while the bankrupt was subsequently trading to a great extent for a period of eight years, without making any claim to his subsequently acquired property. The party then became bankrupt a third time: and it was held that the assignee under the third bankruptcy, and not the assignee under the second commission, had, on principles of equity, the preferable claim to the property thus subsequently acquired; and that such principle of equity applied as well to real as to personal property, notwithstanding the clause of order and disposition (6 Geo. 4, c. 16, s. 72) only applied to personal estate. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court: (a)—

In this case a rule had been granted for setting aside the verdict for the defendant, and entering it for the *plaintiffs for 100*l.* It was an action of trover by the plaintiffs as assignees of the [*675 bankrupt. The defence was, that the bankrupt was an uncertificated bankrupt at the time of the adjudication under which the plaintiffs became assignees; that therefore the property both present and future of the bankrupt was vested in the assignees under the former bankruptcy; and that the latter bankruptcy was void.

It appeared, that the bankrupt, after the first bankruptcy, had traded, and in the course of that trading had obtained the goods in respect of which the action was brought, and had made a fraudulent assignment of those goods to his son, the defendant; that the party who supplied the goods was the petitioning-creditor in the second bankruptcy, and was seeking by means thereof to recover payment for the goods so fraudulently assigned; and that the assignees under the former bankruptcy had not in any manner interfered. Under these circumstances, the claim of the defendant to defeat the plaintiffs by setting up the right of the former assignees seems inequitable and unreasonable; and we have to ascertain whether it can be maintained according to law.

In support of this claim, the defendant cited several authorities. In *Till v. Wilson*, 7 B. & C. 686 (E. C. L. R. vol. 14), 1 M. & R. 580, it appeared that the uncertificated bankrupt had traded and become indebted, and that a second commission had issued against him, under which he had obtained his certificate. He was taken in execution for a debt which would have been barred by the certificate, if the second commission was valid; but the court refused to discharge him out of custody, because it held the second commission under these circumstances to be a nullity. In *Fowler v. Coster*, 10 B. & C. 427 (E. C. L. R. vol. 21), 5 M. & R. 352, the defendant moved to be discharged out of custody for a debt which was barred by his certificate *under a commission, if that commission was valid. His [*676 motion was opposed on the ground that he had been twice bankrupt, and obtained two certificates, and had paid no dividend, and that therefore the third commission, on which he relied, was void for the same reason that would have made it void if he had been an uncertificated bankrupt. The court adjudged the commission to be

(a) The judges present at the argument were Erle, C. J., Williams, J., Willes, J., and Keating, J.

absolutely void. In *Phillips v. Hopwood*, 1 B. & Ad. 619 (E. C. L. R. vol. 20), it appeared that the plaintiffs were assignees under a commission issued against an uncertificated bankrupt, and were entitled to maintain trover if their commission was not void by reason of the former commission: and it was held to be void. In *Nelson v. Cherrill*, 7 Bingham 663 (E. C. L. R. vol. 20), 5 M. & P. 680, in trespass for taking goods, the question was raised by the pleadings whether a commission against an uncertificated bankrupt was void: and the court adjudged it to be so, on demurrer. Afterwards, on the trial of the issues in the same case,—8 Bingham 316, 1 M. & Scott 452,—the question was again raised in respect of the right of the assignees under the last commission to goods in the order and disposition of the bankrupt at the time of the bankruptcy: and the court again decided that the last commission was void, and refused a rule to show cause, on the ground that the matter was decided. In coming to these decisions, the courts relied on the dicta of several Chancellors, and on *Martin v. O'Hara*, Cowp. 823. These authorities have been fully discussed in the cases cited below; and it suffices to observe here, that, in none of the cases before the Chancellors above referred to was there a decision that the last commission was void; on the contrary, in several, its validity to a limited extent was recognised. Also, in *Martin v. O'Hara*, Lord Mansfield assigns as one reason for refusing *677] to discharge the defendant out of custody, that the later *commission was tainted with fraud on the part of the bankrupt.

All of these decisions rest on these two propositions,—first, that an uncertificated bankrupt can have no property,—secondly, that, if there is no property, a commission is void, by reason that there cannot be any effects to be administered under it.

The cases above referred to are strong authorities for holding the last bankruptcy to be void. But the authorities for holding it to be valid, and the reasons on which they are founded, appear to us to be stronger.

It is clear that property is not an essential for constituting bankruptcy. If there is the requisite trading, and debt, and act, the bankruptcy is valid, without any property. It is also clear that an uncertificated bankrupt may acquire property. This appears from the law which transfers his *after-acquired* property to his assignees. This law assumes that he may acquire property; otherwise there could be none to be transferred: and the result of the cases is, not only that he may acquire property, but that he may hold it against all the world except his assignees, and may create rights to hold it against them if they expressly or impliedly consent to such property being in his order and disposition at the time of a subsequent bankruptcy.

In *Fyson v. Chambers*, 9 M. & W. 468, the plaintiff was the administrator of a bankrupt who had been before insolvent, and had not paid 15s. in the pound under his bankruptcy. After the death of the bankrupt, the defendant, as auctioneer, had sold the goods for the next of kin, and paid over the proceeds: and he was still held liable to the plaintiff, who had taken out administration after the conversion. The effect of the decision is, that an uncertificated bankrupt may acquire property. As the conversion by the defendant was at the request of

parties apparently in lawful *possession, and the grant of administration was not made to the plaintiff as creditor till long [678 after the conversion, but still was held to relate back to the death of the bankrupt intestate, and to vest in the plaintiff a right of action for the conversion previous to the grant, it follows that the right in the bankrupt was not a mere possessory title, good against a mere wrongdoer, but a right of property transmissible after death; and, further, it follows, if the right was so transmissible to the administrator, there being a beneficial interest in it, it was also a right of property capable of being transmitted to assignees in bankruptcy, if he had been again made a bankrupt. In *Herbert v. Sayer*, 5 Q. B. 965 (E. C. L. R. vol. 48), Dav. & M. 723, the plaintiff sued as the holder of a bill. The defendant pleaded that the plaintiff had been twice bankrupt, and had not paid 15s. in the pound. The Exchequer Chamber held the plea bad. The judgment is full of learning and sound reasoning, and decides that an uncertificated bankrupt has a right to acquire property, and to hold it against all the world except his assignees; and, if they choose not to interfere, he is absolute owner. In *Butler v. Hobson*, 4 N. C. 290, 5 Scott 798, it appeared that the bankrupt had not paid 15s. in the pound under his second commission, and was therefore in effect uncertificated, and that he had traded with the consent of the plaintiff as assignee, and had goods in his order and disposition at the time he was made bankrupt a third time, under which third commission the defendant was assignee. All the court on the argument held that property so left in the order and disposition of the bankrupt was not in the plaintiff as assignee under the former commission: but, as there was proof also of an insolvency, some of the judges at first avoided deciding whether the first fiat was valid or void, by saying that the property would be in the [679 *assignee under the insolvency, if that fiat was void. *Bosanquet, J.*, however, decides that it was in the defendant as assignee under the last fiat: and the reasoning of all the court is clear to show that the interest of the creditors requires that the property, under such circumstances, should pass to the assignee under the last fiat. Upon the taxation of costs in this case, a further question arose, so that the court had to decide on the validity of the third fiat; and it gave judgment, "that the third fiat is not a nullity, but the assignees under the second commission, who have allowed the bankrupt to retain possession of the goods as reputed owner, are not in a condition to dispute the title of the assignees under a subsequent fiat to seize and administer them:" *Butler v. Hobson*, 5 N. C. 128, 5 Scott 824.

In addition to the cases cited at length, we would refer to the collection of all the authorities relevant to the point, by the counsel who argued *Benjamin v. Belcher*, 11 Ad. & E. 350 (E. C. L. R. vol. 39), 3 P. & D. 317, and among them we would refer particularly to a very able discussion of the point in 3 Mont. & Ayrton, App. xxi. et seq.

We also refer to *Ex parte Butler*, in re *Bakewell*, 2 M. D. & De Gex 731, where the second assignees in *Butler v. Hobson* claimed in the bankruptcy court as against the third assignees, and the court held, that, beyond and besides the reputed ownership clause, the

second assignees were in equity precluded by their conduct from claiming either the personal or real property after acquired, as against the assignees under the third bankruptcy.

We have referred to the authorities at some length, because they conflict. By the review we are brought to the conclusion that a commission against an uncertificated bankrupt was not void under the *680] former statutes, nor is an adjudication against such a bankrupt *void under the statutes now in force: and we consider that we have adduced sufficient authority and reason for holding that the plaintiffs are assignees under a valid bankruptcy; and our judgment is therefore for the plaintiffs. Rule absolute.(a)

(a) *Montagu Chambers, Q. C.*, afterwards,—leave having been reserved to him for that purpose, —moved for a new trial, on the ground that the verdict was against the weight of evidence. But, the learned judge who tried the cause reporting that he was not dissatisfied with the verdict, the rule was refused.

In the Matter of the Complaint of WILLIAM OXLADE against THE NORTH EASTERN RAILWAY COMPANY. Jan. 14.

There is no obligation on a railway company, whether at common law or under the Railway Traffic Act, 1854, to carry goods otherwise than according to their profession.

Therefore, it is competent to them to restrict their coal traffic to the carriage of coals for colliery-owners, from the pit's mouth to stations where such colliery-owners have cells or depots appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal-merchants,—such an arrangement being essential to the regulation of the large traffic in that article, and the company not being “common carriers” of coal.

Re Oxlade, 1 C. B. N. S. 454, confirmed.

MANISTY, Q. C., in Michaelmas Term last, on behalf of Mr. Oxlade, obtained a rule calling upon the North Eastern Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), “to restrain them from violating or contravening the said act, and enjoining obedience to the same; and to restrain the said company from subjecting the said complainant and his traffic respectively to undue and unreasonable prejudice and disadvantage in respect of the matters referred to in the said affidavit, and in particular enjoining the said company to forward the coals and trucks of the complainant from the Ferry Hill Station to the other stations mentioned *681] in the said affidavit, that is to say, York, Leyburn, and *Bedale respectively, in like manner and upon the same terms as they forward coals and trucks for other persons,” with costs.

The motion was founded upon an affidavit of Mr. Oxlade, of which the following are the material paragraphs:—

“1. I carry on my business of a coal-merchant at Tanner's Moat, York; and I sell considerable quantities of coal at York, Leyburn, and Bedale:

“2. The North Eastern Railway Company are the company referred to in the North Eastern Railway Company's Act, 1854 (17 & 18 Vict. c. cxxi). They are the owners of the North Eastern Railway mentioned in that act, and of various stations on that railway, including a station called the Ferry Hill Station, where the said railway

joins with the Clarence Railway, and stations at York, Bedale, and Leyburn aforesaid :

"3. I have a contract subsisting with the owners of the Cox Hoe colliery, in the county of Durham, for the supply by them to me of 5000 tons of coal to be by them loaded in my trucks, and conveyed to the said Ferry Hill Station at the rate of not less than 60 tons per week. Up to the 4th of November instant, the said colliery-owners have employed the said company to convey the said coals; but on that day the said colliery-owners declined further to allow the company's charge for the conveyance of my coals to be charged to them :

"4. In pursuance of the said contract, sixteen trucks containing coals consigned to me were on the 4th of November instant delivered by the said colliery-owners at Ferry Hill Station. The said trucks and their said contents then were and still are my property :

"5. On that day I requested the general manager of the company to forward the said trucks with their said contents to me at Leyburn, Bedale, and York stations *respectively. I then produced to the said general manager the sum of 50*l.* in Bank of England [*682 notes, and requested him to take the company's charge, whatever it might be, for forwarding the said trucks as aforesaid. He then refused to accept any money, and refused to make any arrangement for forwarding the said trucks, or to give any information as to when they would be forwarded :

"6. On the 5th of November instant, I tendered 50*l.* to the station-master of the company at the said Ferry Hill Station (who manages the forwarding of traffic from that station), and requested him to forward the said trucks to the said stations as aforesaid, and to take the company's charge, whatever it might be, for so doing. He then refused to take any money, and refused to forward the said trucks, stating that he had instructions from the company not to receive or forward any of my trucks :

"8. The said company have for years past conveyed and still convey coals in trucks which are similar in all respects to my said trucks, and belong in some cases to the said company and in others to the persons employing the said company, from the said Ferry Hill Station to the same stations and places to which I requested my said coals to be carried as aforesaid, for the owners of the said Cox Hoe colliery, the owners of Byers Green colliery, Whitworth colliery, and many others; and have also for several months next preceding November instant conveyed from the said Ferry Hill Station to the said other stations coals supplied by the owners of the said Cox Hoe colliery, under the said contract, to me, in my trucks :

"9. On or about the 4th of November instant, I was informed in writing by the owners of the said Cox Hoe colliery that they had received a letter from the general manager of the said railway company, stating *that, as the said colliery-owners had declined [*683 to allow the carriage of coals conveyed to me to be charged in account to the said colliery-owners, the said company would not in future receive or forward trucks containing my coals :

"10. My said trucks were in all respects fitted for the purpose of conveying the said coals as requested by me, and the sum tendered by me as aforesaid far exceeded any charge which the said company

can legitimately make or in fact claim to make for the service required by me. No objection whatever was made to the said trucks, nor to the amount offered. The said company have ample means and conveniences for conveying my said trucks as requested by me, and have had ample time for so doing; and they have daily since the 4th of November instant conveyed trucks of coals from the said Ferry Hill Station to York, Bedale, and Leyburn, and left my said trucks behind. The only reason assigned on behalf of the said company for not conveying coals for me, is, that I am not a colliery-owner: and I verily believe that no other reason exists. I have been informed and believe that the object of the company is, to restrict the consignment of coals for sale at York, Bedale, and Leyburn, and other places on the North Eastern Railway, to colliery-owners and their agents:

"11. The Clarence Railway communicates with many collieries in the Durham coal-field; and practically the only means of conveying coals from these collieries to York, Bedale, and Leyburn, is, by the said Clarence Railway to the said Ferry Hill Station, and thence by the said North Eastern Railway to the said York, Bedale, and Leyburn stations:

"12. I have occasion for the coals contained in my said trucks, which still remain at Ferry Hill Station as aforesaid, for the purpose *684] of my said business; and *the further detention of the said trucks, and the refusal of the said company to convey my coals, will cause great inconvenience and damage to me."

Mellish, Q. C., now showed cause, upon an affidavit of Captain O'Brien, the general manager of the company, the material parts of which were as follows:—

"4. The company's business of receiving and hauling or carrying and delivering coal differs from the business of the said company as common carriers as to the receipt, carriage, and delivery of goods in general, both in respect to the quantity which passes over their railways and to the nature of the article itself:

"5. In the course of each year, about 8,000,000 tons of coal pass over some part or the other of the railways belonging to the said company, which gives an average of about 5000 trucks every working day throughout the year; and great care is required to prevent so great an amount of coal-traffic from interfering with the general goods and passenger traffic on the said railways, and from endangering the personal safety of the public when travelling as passengers on the said railway. No other article passes over the said railways, or any part thereof, in any way to be compared in respect to quantity with coal; and the quantities of all the other articles which in the year pass over the said railways, or any part thereof, when united, do not equal the quantity of coal so passing in the same period. The company's stock of coal-wagons is also very large. They have upwards of 34,000 coal and coke wagons; and the mode by which the company are remunerated for the large amount of capital laid out in these wagons, is, by a payment according to the number of miles each wagon may run per annum, for which reason, and in order that the *685] wagons may be fully employed, it is of the utmost *consequence that they should not be delayed in transit or at the places of loading or discharge, but should be returned with every

expedition possible, and utilized as much as may be. Any overcrowding of wagons at the company's depôts, or sending of wagons to the depôts before they are wanted for discharge, causes great delay and inconvenience, not only to the wagons which have been sent before they are wanted, but also to all the other wagons sent there, as those not wanted have then and from time to time to be sorted out and moved out of the way until wanted, or in order to let the others be unloaded or pass away to their destination, or be removed when empty. Regulations as to the ordering of wagons of coals for transmission to any depôts are therefore essentially necessary, and obliged to be acted upon and complied with, or great inconvenience, delay, and loss would arise:

"6. The general practice of the said company and other railway companies and carriers, with respect to other articles, is, to receive them at some station or place of business, and there to place them in carriages of some sort, and then to carry them to some other station or place of business, and (except as regards what are called station-to-station goods, which are carted and removed by the consignors and consignees thereof) thence to carry them by cart or hand to some house or place, for the purpose of delivery to their consignee: but, as coal does not travel in boxes, sacks, or other packages (except when a small sample of some particular sort may now and then be sent), but loose in the bulk, in practice it has never been and is never delivered to the company or received by the company at any station or place of business of the company, there to be placed in carriages; but in practice it has always been and always is loaded in trucks at the pit where it is gotten from the mine, and by appliances there provided and constructed on purpose, and thence to pass [686 in such trucks down a private branch railway from the pit to some junction of that branch with the railway of the company, or to some junction of that branch with some other public railway, and so towards and to some junction with the railway of the said company; so that, when it first arrives at the line or premises of the company, it arrives in trucks or wagons, and is then pushed or shunted into siding lines of rails (generally belonging to the company, and adjoining their railway), there to wait until it can be hauled thence upon and over their railway for transit to its destination. The coal which thus arrives being thus on the siding rails of the company, a necessity arises for such sidings being speedily cleared, to make room for succeeding quantities of wagons, and for those in the siding being forwarded with all practicable expedition to some place where the trucks can be discharged of their contents, or where the trucks can pass from the said railways of the company upon some other railway, otherwise the rails and siding lines or standage grounds of the company would be encumbered with an accumulation of loaded trucks; and this also renders it necessary that no trucks loaded with coal should be received on the rails or sidings of the company, which are not destined to some known and previously-arranged place where such trucks can be discharged of their cargoes or pass off the railway of the said company upon some other railway. Similar siding lines or standage ground for wagons have also been constructed and provided by the company, where necessary, in which the empty wagons

are placed and arranged together in proper order (so far as practicable), for the particular collieries where they are destined, and from which they are moved direct to such collieries, or on some other *687] line of railway communicating with the private railway leading to such collieries. The company have constructed hundreds of miles of such siding lines of railway, which are extra lines of railway used for the passage of trains through to their destinations. The cost of these siding lines and standage ground has been very large; and it is of great moment to the company that they should be occupied or obstructed by wagons for the shortest possible time, and used to the greatest advantage, and in such a way as to give the least interruption and the utmost facility to the trade for which they have been constructed, and the best return possible for the capital expended:

"8. The said company has two hundred and seventy-eight stations on its railways where coal is sold.

"10. The system which has been adopted is as well suited to the interests of the public as any system can be: and, if the company are compelled to receive and haul on their rails from any of their stations, and for any person who may choose to require them so to do, trucks of coal under the circumstances under which Mr. Oxlade required the company to receive and haul, his trucks on the occasion to which his affidavit refers, it would be utterly subversive of the existing system, and it would not be possible for the company to conduct the traffic on their railways:

[Paragraphs 11 and 12 described the construction and regulation of the coal depôts or cells at the several stations.]

"13. The company's depôts are in fact large places of deposit of various kinds of coals, to which all the public, whether private individuals or coal-merchants, can resort whenever they like, and purchase and remove any description of coal they like which may happen to be on sale by the coal-owners at such depôts. These depôts in fact *688] render coal-merchants unnecessary at the places where the depôts exist, as the public have only to send their own carts and horses or else employ a carter to cart coals for them from the depôts when and as they want coals for consumption,—thus avoiding the expense of the intervention of a coal-merchant or third person; or they can buy coals through the colliery owner's agents, who will then see to the delivery of the proper sort and quantity of coal at the place where the buyer desires to have it. At the York depôts there were sold in the twelve months ending October last no less than forty different sorts of coal from the Yorkshire coal-field, and sixty-four different sorts of coal from the Durham coal-field. The price of all kinds of coals, at whatever station sold, is fixed by the colliery-owner from time to time as he may think proper, without reference to or control by the company; and such owner is unrestricted in any way by the company as to his giving credit or as to his dealings with his customers.

"16. The number of cells is regulated as aforesaid by the consumption and demand of the respective districts, and by the number of persons who may from time to time wish to have cells for the sale of coal. The number of colliery-owners, exclusive of coal-merchants,

who may wish to have cells for such purpose, probably exceeds to the number of cells to a great and unknown extent, and might, as each station, embrace any and every colliery-owner in the coal-fields of Durham and Yorkshire whose coals can be carried to that station :

"19. The number of cells at York is forty-two, at Bedale eleven, and at Leyburn ten ; and these numbers are sufficient to accommodate the quantity of coal required for consumption in the districts which are supplied from those stations respectively :

"20. It is therefore impossible that every *colliery-owner can be accommodated with a cell at any particular station ; and only a comparatively few can be so accommodated : but, as before explained, the company can only receive for a particular station coal in respect of which some arrangement exists for its being discharged from the trucks at that station. This arrangement is effected by letting or appropriating the cells to colliery-owners, that is to say, to the persons who own the pits and get the coal from them ; from which arrangement it follows that the company can and do receive for a particular station the coals of those colliery-owners only who have cells there, and cannot, and never do receive for any station the coals of colliery-owners who have no cells there :

"21. Though colliery-owners who cannot obtain cells may complain that they cannot obtain such accommodation, the principle on which the system of the company is based,—being not to receive coal on their rails which is not consigned to some place where by previous arrangement it is sure of either being speedily discharged from the trucks or of being removed in the trucks to another railway, —is generally admitted to be reasonable and necessary, and is not complained of. If that principle were not acted on, the business of the said company could not be carried on without an amount of inconvenience the limit of which it is impossible to estimate :

"23. The mode of selling which arises from the cell or dépôt system above described is very convenient for the public. Each cell is open to the yard ; and a notice is affixed to it, indicating the sort of coal there to be sold. An agent is appointed and paid by the company for the colliery-owners generally having cells at each station, for the sale of all the coal in all the cells, and he accounts to each colliery-owner. But at York, in addition to the agent so appointed by the *company, certain owners of collieries having cells there appoint an agent for the sale of the coals sent from their collieries to York ; and he accounts to them :

"25. No coal is allowed to be received on the rails of the company destined for an unappropriated cell, except such coal as is ordered through the agent as aforesaid :

"26. Through the superintendence of the agent aforesaid, care can be and is taken that no more coal is sent to any cell that is let or appropriated than such cell can accommodate. As the cell empties, the agent communicates through the company's mineral department with the owners of the colliery for whose coal the cell is appropriated, and the colliery-owner forwards to the cell the quantity required to keep up, and not more than is required to keep up, the stock in the cell :

"27. The company only haul coal on their railway according to the system aforesaid ; and they have only such a supply of engines for

the purpose of hauling as the regular traffic on their railway requires, including spare engines kept ready for cases of emergency. The company do not and never have undertaken to find engine-power to haul wagons for any one who may desire to have such hauling done; but every person may, if he complies with the regulations of the railway, find his own engines, as well as his own wagons, and run them on the railway:

"28. *The company are not and never have been common carriers of coals.* They have not and never had any place for the receipt from the public generally of coal for carriage. As to coal which is not to pass from their railway to another railway, they only haul such coal for those who have cells appropriated to them, or such coal as is so bespoken through the agent as aforesaid:

*691] "34. The company in practice, but without any definite rule on the subject, only appropriate the cells to colliery-owners; and the reason for this is, that the colliery-owners to whom cells are appropriated can supply direct from their respective pits, and in any quantity, the particular sort or class of coal which the public like in the particular district where those cells are situate:

"36. The company have no coal-cells or depôts at Ferry Hill, and do not receive coal at or carry any coal to that station for the purpose of being there supplied to the public resident in the neighbourhood thereof; there being no necessity for any such supply, as coal-mines and pits exist in the immediate neighbourhood, where coals can be purchased at the pit's mouth cheaper and in greater abundance than in any other way:

"38. The North Eastern company are not, and have always refused to become, and have never held themselves out as, common carriers of coal, and in particular have never been such or done so from the Ferry Hill Station on their railway, or from the point of junction therewith of the railway of the West Hartlepool company to any place, nor in particular to the stations at York, Bedale, and Leyburn aforesaid, or any of them: and the North Eastern company do not carry coal at all, except under the special arrangements and conditions above described:

"46. The said William Oxlade is not a colliery-owner, or in any way interested in any colliery, and has not any depôt or place for deposit of coals having railway connection with the company's railway at any of their stations, or elsewhere."

The system which the company act upon is precisely that which this court sanctioned in the year 1857, in the matter of a complaint *692] against them by *Mr. Oxlade,—1 C. B. N. S. 454 (E. C. L. R. vol. 87). On that occasion, the court referred it to one of the Masters to inquire and report; and the result the court came to, was, that the company were not common carriers of coal, and that they had not, in respect of the matters then and now complained of, been guilty of any infraction of the Railway Traffic Act.

Manisty, Q. C., was called upon to support his rule.—If the company have the means of carrying coal for A. B., a colliery-owner, and have the same facilities, subject to the same regulations and arrangements, for carrying coals for C. D., a coal-merchant,—the law does not, it is submitted, permit them to say that they will deal with the

coal-owner only, and will not carry for the coal-merchant. [WILLIAMS, J.—Is not that saying in effect that the company are common carriers of coal? In *Johnson v. The Midland Railway Company*, 4 Exch. 367, it was held that the 86th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, is permissive only, and that a railway company who under it elects to carry goods, is subject to no greater liability than attaches to carriers at common law; and therefore such a company is not bound to carry every description of goods, and between all places on their line, but only such goods and to and from places as they have publicly professed to do, and have convenience for that purpose. Why may not a railway company say that they will only carry for wholesale dealers? *Mellish*, Q. C.—The company do not profess to carry for *all* coal-owners, but only for such as have cells allotted to them at the different depôts, where the coals may be conveniently unloaded.] The question is, whether the law justifies them in so selecting their customers. It is contrary, it is submitted, to the whole spirit of the Railway *Traffic Act. [WILLIAMS, J.—I think we are precluded from entertaining this matter by [*693 the decision which this court came to in 1857.]

ERLE, C. J.—As to the duty of the company as carriers at common law, the case of *Johnson v. The Midland Railway Company*, 4 Exch. 367, is a distinct authority to show, that, as a general rule, railway companies are only bound to carry according to the profession they make. And I am of opinion, seeing the large amount of traffic in coals upon the North Eastern Railway,—upwards of 8,000,000 tons per annum,—there is very good reason for the company saying that they will carry coals for colliery-owners only. These may wait until the company are ready to receive them; but coals belonging to others, when once afloat on the line, are not managed with the same facility. The 1st section of Mr. Cardwell's act provides “that every railway company, &c., shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic, &c.; and no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.” It appears from the affidavit of Captain O'Brien that the company are carrying coals under the regulations which were approved of by this court in the year 1857. The question then before the court was raised upon the Traffic Act. It was a considered judgment: and the reasons given by the court for the conclusion there come to are quite satisfactory to my mind. I think the company have a perfect right to say that *they will [*694 carry coals only for colliery-owners. For the reasons alleged [*694 by them in their affidavits, it is evident that they could not have the same control over the traffic, if they carried coals for the general public. Mr. Oxlade says to the company,—“Make an exception in my favour, because you have hitherto carried my coals for the owners of the Cox Hoe colliery, and I will abide by all your regulations.” The answer to that, is, that, if the company do this for Mr. Oxlade, they would be bound to do it for all the Queen's subjects, and so would de-

prive themselves of the benefit of the complicated arrangements which they have found it necessary to adopt in order to insure the safe and convenient use of their railways. I think the rule must be discharged and with costs.

WILLIAMS, J.—I am quite of the same opinion. I think the principles laid down by this court in the case of *Oxlade and The North Eastern Railway Company*, 1 C. B. N. S. 454 (E. C. L. R. vol. 87), must govern our decision here. If the matter is to undergo any further discussion, it must be by way of appeal against the decision in that case and also against the decision of the Court of Exchequer in *Johnson v. The Midland Railway Company*, 4 Exch. 367. I see nothing in the system which the company have adopted, to bring them under the control of the court for an infringement of the provisions of Mr. Cardwell's act.

The rest of the court concurring,

Rule discharged, with costs.

•695] *OXLADE *v.* THE NORTH EASTERN RAILWAY COMPANY. *Jan. 28.*

The defendants obtained a verdict in July, 1862. In September, the plaintiff filed a petition in bankruptcy, and in November he was adjudged entitled to his discharge, but the formal order was not drawn up until the 18th of August, 1863. In November, 1862, the plaintiff made an unsuccessful motion for a rule to enter the verdict for him. There being a demurrer upon the record which was undisposed of, the defendants did not sign final judgment and tax their costs until the 10th of August, 1863; and in December they issued a *f. fa.*, under which certain (after-acquired) goods of the plaintiff were seized:—Held, that the costs were not a debt or a contingent liability provable at the time of the bankruptcy, and consequently that the execution was regular.

IN the year 1860, the plaintiff brought an action against the North Eastern Railway Company to recover back certain alleged overcharges extorted from him by the company for the conveyance of certain coals for the plaintiff upon their railway. The defendants pleaded several pleas which raised issues in fact, and they also demurred to a part of the declaration. The issues of fact were tried before Martin, B., at the Yorkshire Summer Assizes, 1860, when a verdict was found for the plaintiff upon the material part of those issues, leave being reserved to the defendants to move to enter the verdict for them. A rule nisi was obtained accordingly in Michaelmas Term; and upon the argument of that rule in Hilary Term, 1861, the court directed that the verdict should be entered for the defendants, and that the demurrer should be withdrawn. The plaintiff appealed against that decision; and at the sittings in error after Hilary Term, 1862, a new trial was awarded. The pleadings were afterwards amended, and a demurrer to certain counts of the declaration was placed upon the record. The cause was tried again before Erle, C. J., at the sittings in London after Trinity Term, 1862, when a verdict was found for the defendants upon the material issues; execution being stayed until the fifth day of the following Michaelmas Term, in order to enable the plaintiff to move the court.

On the 3d of September, 1862, the plaintiff filed a petition in the Yorkshire county court, and on the 9th was duly adjudicated a bank-

rupt. On the 4th of November, he passed his last examination, and was adjudged to be entitled to his discharge.

*On the 10th of March, 1862, the plaintiff moved for a new trial, on the grounds of misdirection and that the verdict was against the weight of evidence. No rule was granted. The plaintiff gave notice of appeal, but did not proceed with it. The *postea* was finally settled on the 3d of December, 1862; and on the 15th an order was made for the withdrawal of the demurrer, and for all necessary amendments consequent thereon to be made in the record. [*696]

On the 1st of August, 1863, the defendants signed final judgment in the action, and on the 10th their costs in respect of the issues found for them were taxed and allowed at 187l. 17s. 2d.; and a fi. fa. was issued on the 14th of December last, under which the sheriff seized and sold certain wagons and coals belonging to the plaintiff.

The formal order of discharge under s. 170 of the Bankruptcy Act, 1861, was not drawn up until the 18th of August, 1863.

Oxlade, in person, on a former day in this term, obtained a rule nisi to set aside the execution, on the ground that these costs were a debt or a contingent liability which might have been proved under the bankruptcy. He referred to the 178th and 181st sections of the 12 & 13 Vict. c. 106, and the 180th section of the 24 & 25 Vict. c. 134. [The Court seemed to think that the costs would be provable under s. 181 of the 12 & 13 Vict. c. 106, and the 149th section of the 24 & 25 Vict. c. 134.]

Mellish, Q. C., now showed cause.—The costs in question did not become a debt provable under the bankruptcy until they were taxed, viz. on the 10th of August, 1863, which was after the day on which the bankrupt obtained his order of discharge. The 178th [*697] *section of the 12 & 13 Vict. c. 106, has no application to costs: and s. 181,—which enacts, that, “if any defendant shall have obtained any judgment, decree, or order in any action or suit, or in the matter of any petition (in bankruptcy or lunacy) against any person who shall hereafter become bankrupt, such defendant shall be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy,”—applies only to a case where the judgment has been signed and the costs have been ascertained and become due at the time of the bankruptcy. Debts incurred subsequently to the fiat clearly are not provable. In *Ex parte Bell*, In re Laforest, 32 Law J., Bankruptcy, 50, it was held that the words “order of discharge” in the Bankruptcy Act, 1861, denote two different things,—first, the order made by the court on the application of the bankrupt, and which is made and pronounced by the commissioner, subject to appeal, and is recorded in the proceedings,—and secondly, that further document or certificate which is formally drawn up and handed over to the bankrupt after the time allowed (by s. 171) for appealing has elapsed. The order of discharge referred to by the 1st rule of the 159th section is the first of them, and the date from which it takes effect is the time when it is pronounced by the court: consequently, where, after the making of the order of discharge by the commissioner, but before the expiration of the time (thirty days) required by the 170th section to elapse before the order of discharge should be

drawn up, property devolved upon the bankrupt, it was held that he, and not the assignees, was entitled to it.

Oxlade, in support of his rule.—The liability to pay these costs was *698] a contingent liability to pay money *within the 178th section of the 12 & 13 Vict. c. 106. It became a judgment-debt before the final order of discharge took effect. The 162d section of the 24 & 25 Vict. c. 134,—which enacts, that, “if a bankrupt, after the order of discharge takes effect, be arrested or detained in custody for a debt, claim, or demand provable under his bankruptcy, where judgment has been obtained before the order of discharge takes effect, the court or a judge of a superior court of law shall, on proof of the order of discharge, and unless there appear good reason to the contrary, direct the officer who has the bankrupt in custody to discharge him,”—shows that the person of the bankrupt under circumstances like these is free from process; and, if so, it is submitted, so also must his goods be.

ERLE, C. J.—I am of opinion that this rule must be discharged. The judgment upon which the execution which is sought to be set aside was issued, was signed in August, 1863. It was a judgment for costs upon a verdict obtained by the defendants in July, 1862. In September, 1862, the plaintiff petitioned the county court of Yorkshire, and on the 9th of that month was duly adjudicated a bankrupt. On the 4th of November he was adjudged to be entitled to his discharge; but the formal order was not drawn up until the 18th of August, 1863. The question which we have now to decide, is, whether the sum for which the judgment was signed (the taxed costs of the defendants in the action) was a debt due to the defendants, and for which they might have proved, at the time of the plaintiff's bankruptcy. The verdict was obtained in July, 1862: but a verdict is not a judgment for costs: it may be set aside, and may never ripen into a judgment. Indeed, in this case leave was given to the plaintiff to move to set aside that verdict: and he *699] exercised the right thus reserved to him, after he had been adjudicated a bankrupt, and had been declared entitled to his discharge. The plaintiff contends, that, as his person is free from process, so must his property be also, and that the judgment for these costs was a debt provable by virtue either of the 12 & 13 Vict. c. 106, or of the 24 & 25 Vict. c. 134. Now, the 181st section of the former statute is the one which comes nearest to the present case. That section enacts, “that, if any plaintiff in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall hereafter become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the bankruptcy, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy; and, if any defendant shall have obtained any judgment, decree, or order in any such action or suit, or in the matter of any such petition, against any person who shall hereafter become bankrupt, such defendant shall be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the

time of the bankruptcy." The defendants here had no judgment for these costs at the time of the plaintiff's bankruptcy. I am therefore clearly of opinion that they did not constitute a debt provable under that section. Nor do I find any section in the 24 & 25 Vict. c. 134 which gave them that right.

WILLIAMS, J.—I am entirely of the same opinion. These costs were clearly not a contingent debt or liability within the 178th section of the 12 & 13 Vict. *c. 106, nor a debt due for costs at the time of the bankruptcy within s. 181. [*700

WILLES, J.—I am of the same opinion. A distinction used to be drawn between the case of a plaintiff obtaining a verdict, the judgment upon which was not signed or the costs taxed until after the bankruptcy, in an action of debt, and a verdict in an action of tort under similar circumstances. In the former case the amount might be proved; in the latter not. As to a defendant, however, there never was any doubt until the passing of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106) that the defendant was not entitled to prove for costs unless there was a judgment and a taxation before the bankruptcy. And even after the 6 G. 4, c. 16, had introduced a provision in favour of a plaintiff obtaining his costs in all cases, provided a verdict was obtained before the bankruptcy, the judgment being after, this court in a case of *Biré v. Moreau*, 4 Bingh. 57 (E. C. L. R. vol. 13), 12 J. B. Moore 226, refused to adopt what was said to be an analogy suggested by that provision, and declined, under circumstances similar to those of the present case, to rule that costs due to a defendant upon a verdict before the bankruptcy, the judgment being after the bankruptcy, were capable of proof under the fiat. That case is precisely in point, and must govern our decision here, unless its effect has been annulled by the 181st section of the 12 & 13 Vict. c. 106, which for the first time introduced a provision with respect to costs due to a defendant, but not taxed until after the bankruptcy. That section, as has already been stated by my Lord, is clearly confined, not in construction only, but in language, to the case of a judgment obtained before the bankruptcy,—before the inception of the proceedings in bankruptcy.

*KEATING, J.—I am of the same opinion. Until the month of December, 1862, the North Eastern Railway Company were not in a condition to sign judgment for these costs. In that month the demurrer was removed from the record. That was long after the bankruptcy of Mr. Oxlade, and consequently these costs were not provable. The rule must be discharged. [*701

ERLE, C. J.—As the plaintiff was rather encouraged by the court to take the rule, we think it is hardly a case for costs.

Rule discharged, without costs.

PIGOT v. CUBLEY. Feb. 1.

Where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day,—*Seem* that such a power of sale is implied by law from the nature of the transaction.

But, where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties,—it is not competent to the pawnee to sell without a proper demand and notice.

A notice that he will sell unless an excessive sum be paid immediately, is not such a notice as will justify the sale.

THIS was an action for the wrongful conversion of two pictures belonging to the plaintiff. The defendant pleaded not guilty, and that the goods were not the goods of the plaintiff, whereupon issue was joined.

The cause was tried before Williams, J., at the first sitting at Westminster in Easter Term last, when the facts which appeared in evidence were as follows:—The plaintiff, who was possessed of two pictures, the subjects of which were “The Opera Cloak” and “The Fireman’s Dog,” applied to the defendant for a loan of 5*l.*, for which he proposed to give the latter a promissory note at one month, to be *702] secured by a charge on the pictures, which were then in the possession of one Morton, the proprietor of a place of amusement called The Canterbury Hall. The defendant consented to this arrangement, and accordingly gave the plaintiff 4*l.*, receiving from him a promissory note for 5*l.* (1*l.* being retained for interest in advance), and a letter addressed to the person in whose possession the pictures were, to the following effect:—

“Sir,—I hereby authorize you not to allow the two pictures placed by me in your gallery to be given up to any one except Mr. John Cubley or his order.”

“R. S. Pigot.”

“July 3d, 1862.”

The note not having been paid at maturity, the defendant wrote to the plaintiff. It was then arranged between them that further time should be allowed for the payment of the note, the plaintiff paying (as the jury found) 10*s.* per month for the accommodation. On the 17th of September, the defendant wrote to the plaintiff as follows:—

“Sir,—Unless the amount of my claim (6*l.* 10*s.*) is settled by you, I shall proceed to dispose of the pictures in my charge, towards liquidation of the same, and then proceed against you for whatever balance remains after they are sold.”

“JOHN CUBLEY.”

“Mr. R. S. Pigot.”

The sum thus demanded was in fact 1*l.* more than was due at that time; and the letter did not reach the hands of the plaintiff until December. By that time one of the pictures was sold, and the defendant had put up the other to be raffled for. The two pictures produced 5*l.* In January, 1863, the plaintiff tendered to the defendant the amount due upon the note, with the stipulated interest, and demanded back his pictures: and, upon the defendant’s refusal to restore them, this action was brought.

*703] *On the part of the plaintiff it was contended, that the time for the repayment of the loan being indefinite, and that, the

defendant's letter of the 17th of December claiming more than the defendant was entitled to, the sale was a wrongful act.

For the defendant it was insisted that the time was sufficiently fixed by the agreement, and the subsequent extension for one month on payment of 10s., and therefore that he was justified in selling.

The learned judge left it to the jury to say whether they believed the plaintiff, that the time for payment of the note had been postponed *indefinitely* in consideration of 10s. per month, or the defendant, that he had only agreed to extend the period for *one month*, and whether there was any express power to sell the pictures on default; and he requested them to find what was the value of the pictures.

The jury found that the plaintiff's version of the agreement was the true one, and that there was no express power to sell; and they assessed the value of the pictures at 20*l*. The learned judge intimated an opinion that a power to sell the pictures on default was to be implied from the circumstances; and he directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter it for him for 20*l*., if the court should be of opinion that there was under the circumstances no power of sale.

Watkin Williams, in Easter Term, obtained a rule nisi accordingly.

David Keane, in Trinity Term, showed cause.—The verdict, it is submitted, was properly entered for the defendant. In *Pothonier v. Dawson*, Holt N. P. C. 383 (E. C. L. R. vol. 3), it was held by Gibbs, C. J., that, if goods are deposited as a security for a loan of money, such deposit *constitutes something more than the right of lien; [704] and it is to be inferred that the contract between the parties is, that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit. The Chief Justice there says: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But, when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this,—If I, the borrower, repay the money, you must re-deliver the goods. But, if I fail to repay it, you must use the security I have left to repay yourself. I think therefore the defendant had a right to sell." In the note to Story's Equity Jurisprudence, § 1033, the learned author says of this case,—"There is certainly much sound sense to commend itself in this interpretation of the contract of pledge in such a case." It is precisely this case. Story assumes in the section referred to, that the pledgee may after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree." In Story on Bailments, § 311, it is said: "The case of pawns seems in this respect distinguishable from the ordinary case of liens; for, a mere right of lien is not understood to carry with it any general right of sale to secure an indemnity. The foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation: but, in the case of a lien, nothing is supposed to be given but a right of retention or

*705] detainer, unless under special circumstances." In *Tucker v. Wilson*, 1 P. Wms. 261, where an Exchequer annuity *had been assigned for securing a loan, with a defeasance, that if the money were paid at such a day, the assignment should be void, Lord Harcourt held that the mortgagee had no power to sell on default, such a power not having been expressly reserved to him by the deed; but the decree was reversed by the Lords,—*Wilson*, app., *Tooker*, resp., 5 Bro. P. C. 193. In *Martin v. Reid*, 11 C. B. N. S. 730 (E. C. L. R. vol. 103), a doubt is suggested as to the right of a pawnee to sell the pledge, where no day has been fixed for the payment of the sum for which the chattel is impignorated. In the course of the argument in that case, reference is made to a note of Mr. Smith to the case of *Coggs v. Bernard*, in 1 Smith's Leading Cases, 5th edit. 194, where it is said: "A *pawn* differs, on the one hand, from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied [see *The Thames Ironworks Company v. The Patent Derrick Company*, 1 Johns. & H. 93], and on the other hand from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that, when the condition is broken, the property remains absolutely in the mortgagee; whereas, a *pawn* never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor, is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it,"—citing Com. Dig. *Mortgage* (B.); *Walter v. Smith*, 5 B. & Ald. 439 (E. C. L. R. vol. 7); *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Demandray v. Metcalf*, Pre. Ch. 419, 2 Vern. 691; *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Ratcliff v. Davis*, Yelv. 178. *In another part

*706] of the note it is said, that, "if the pawnor make default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord, without any previous application to a court of equity,"—referring to *Pothonier v. Dawson*. Here, the right of sale attached on default being made in payment of the 5*l.* on the 6th of August. Having thus a right to sell on the 7th, the defendant agrees, in consideration of the sum of 10*s.*, to postpone the exercise of that right for a month,—or, as the jury have found, for an indefinite time. For selling in the meantime, it might be that the defendant may be liable to an action of some sort, but clearly not to an action for a wrongful conversion. The fact of the defendant having demanded more than he was entitled to, makes no difference. This is not like the case of a demand made to establish a forfeiture, which was required to be in the strictly proper form and of the proper sum. Take the ordinary case of a notice of dishonour, which need not be strictly accurate in all its particulars, but which is sufficient if it substantially points out to the drawer or other party to whom it is addressed, that the bill has been dishonoured, and that he is looked to for payment: *Stockman v. Parr*, 11 M. & W. 809; *Bromage v. Vaughan*, 9 Q. B. 608 (E. C. L. R. vol. 58). So, here, it is submitted that the defendant's letter of the 17th of September substantially

conveyed an intimation to the plaintiff, that, unless the sum due from him upon the note was paid, the defendant would proceed to sell the pictures.

Watkin Williams, in support of the rule.—It does not follow as a matter of law, that, because a day is fixed for the payment of the money, that is necessarily the last day the party has to redeem the pledge. Something subsequent must be done. The power of [*707] sale in such a case is but an inference of fact from what the parties are assumed to have intended. *Pothonier v. Dawson* is the only case which has held,—and that rather as an inference of fact,—that the power of sale can be exercised without a demand of the money, and without notice that the article will be sold unless the advance be repaid. The observations in *Mr. Smith's notes to Coggs v. Bernard* refer to cases where there is a stipulated time for repayment, which the jury have negatived in this case. In 2 *Kent's Commentaries* 581 (10th edit. 804), the law is thus stated: "At common law, if the pledge was not redeemed by the stipulated time, it did not then become the absolute property of the pawnee, but he was obliged to have recourse to process of law to sell the pledge; and, until that was done, the pawnor was entitled to redeem. If the pledge was for an indefinite time, the creditor might at any time call upon the debtor to redeem, by the same process of demand. Where no time was limited for the redemption, the pawnor had his own lifetime to redeem, unless the creditor in the mean time called upon him to redeem: and, if he died without such call, the right to redeem descended to his personal representatives. The law now is, that, after the debt is due, the pawnee may not only proceed personally against the pawnor for his debt without selling his pawn, for it is only a collateral security, but he has the election of two remedies upon the pledge itself. He may file a bill in Chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate, and other chattels pledged for the payment of the debt. But the pawnee is not bound to wait for a sale under a decree of foreclosure, as he is in the case of a mortgage of land (though Lord Chancellor Harcourt once held *other- [*708] wise); and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem. This was so settled in the cases of *Tucker v. Wilson*, 1 P. Wms. 261, 5 Bro. P. C. 193, and of *Lockwood v. Ewer*, 2 Atk. 303. The notice to the party in such cases is, however, indispensable. This was conceded in *Tucker v. Wilson*, and it has since been so ruled in this country (*De Lisle v. Priestman*, 1 *Browne's Penn. R.* 176; *Covell v. Gerts*, 9 *Law Reporter* for July, 1846). The old rule existing in the time of *Glanville*, and which is now the rule on the continent of Europe, and in Scotland, required a judicial sentence to warrant the sale. The Code *Napoléon* (art. 2078) has retained the same check, and requires a judicial order for the sale; and the Code of Louisiana has followed the same regulation. The civil law allowed the pawnee to sell in case of default of payment, and after due notice, on his own authority; but, if there was no special agreement, it required a two years' notice to the debtor, by an order of Justinian." To the like effect is the law laid down in *Addison on Contracts*, 4th edit. 325 et seq., where the authorities are

carefully collected and reviewed. Here, on the application of the debtor, a new contract for an indefinite extension of the time of payment is entered into in consideration of a monthly payment of 10s.^(a)

ERLE, C. J.—We granted a rule nisi this morning in a case of *Johnson v. Stear*, which seems to involve the same question. We will therefore suspend our judgment in this case until that rule has been argued, so that one consistent decision may govern the two cases.^(b)

Cur. adv. vult.

*709] *ERLE, C. J., now delivered the judgment of the court: (c)—In this case the plaintiff sued the defendant in trover for the wrongful sale of two pictures. They had been placed in the defendant's hands by the plaintiff on the occasion of a loan of 5*l.*, for which the plaintiff gave the defendant a promissory note at a month, 1*l.* having been deducted for interest in advance. When the note became due, viz. on the 6th of August, 1862, the defendant applied to the plaintiff for the amount. But he requested further time for payment, which the defendant allowed, on the terms of 10s. a month being paid for interest. According to the defendant's evidence, a single month's time was given: but the plaintiff swore,—and the jury believed him,—that the extension of time on these terms was indefinite. After the first month's extended time had expired, viz. on the 17th of September, the defendant wrote to the plaintiff to the effect that, unless the amount of his claim was paid, he should proceed to sell the pictures in liquidation of it. But, by mistake, he claimed 1*l.* too much by this letter; and it did not reach the plaintiff till he returned to London in November. At that time the pictures were unsold. No further communication took place between him and the defendant till after the defendant had sold the pictures. The plaintiff then tendered the defendant the debt, with the stipulated monthly interest, and demanded back the pictures. But the defendant declined to accept the money, on the ground that he had already sold them. On these facts, the question arose, whether such sale was unauthorized, inasmuch as the jury found that it was not expressly made a part of the original *710] agreement, that the defendant should have a *power to sell in default of due payment of the note. The judge at the trial thought that the defendant had nevertheless authority to sell, inasmuch as the deposit was made as a security for the payment of the debt on a future day certain. And the verdict was accordingly entered for the defendant.

We think that the judge was right as to this point, on the authority of the cases collected in the notes to *Coggs v. Bernard*, in *Smith's Leading Cases*, 5th edit. 171, and the recent decision of this court in *Johnson v. Stear*, ante, p. 330.

But it is unnecessary for the court to determine this question, because leave was also given to move to enter a verdict for the plaintiff on another point, viz., that, before the power to sell, supposing it to have been conferred, was exercised, the parties had substituted a new agreement, under which the time for payment, and consequently

(a) Which, it seems, was not paid.

(b) See *Johnson v. Stear*, ante, p. 330, which however ultimately turned upon a different point.

(c) The case was argued before Erle, C. J., Williams, J., Byles, J., and Keating, J.

the power of sale, was indefinitely extended. And, on this latter point, our opinion is in favour of the plaintiff; for, although it was certainly competent to either party, by taking proper steps, to terminate the new arrangement, yet we think the mere sending of the letter demanding an excessive amount had not that effect.

The verdict must therefore be entered for the plaintiff for 20*l.*, the damages found by the jury. Rule absolute accordingly.

The court expressed the opinion in the principal case, that, where the time for the repayment of a loan is fixed, the pledgee has the right, at the expiration of the period of credit, upon default to sell the pledge; *dubietur*, where no time is fixed: *Martin v. Reid*, 11 C. B. N. S. 730. In *Davis v. Funk*, the same point was decided in the court below; but though argued in error, was not, in fact, raised and presented to the Supreme Court for determination. The point had been affirmed, by the judge who tried the cause, in favour of the party who became the plaintiff in error: 3 Wright (Pa. 1861) 243. In that case the pledge was a promissory note given as collateral security for the repayment of a loan, and it was contended that it was the duty of the pledgee to collect the note and apply the proceeds to the payment of the debt. This was decided in *Wheeler v. Newbold*, 16 N. Y. 393; *Nelson v. Edwards*, 40 Barb. 279. So far is this true that he is liable for the value of the note, if the maker becomes insolvent after he had an opportunity to collect it, and neglected to avail himself of the chance: *Lambertson v. Windom*, 12 Minn. (1867) 232. But as a creditor who takes a negotiable note as collateral security for an advance made at the time, *Curtis v. Mohr*, 18 Wisc. (1864) 615, or for an extension of the time for the payment of a past indebtedness, *Pratt v. Ooman*, N. Y. Transcript, March 22, 1869, is a holder for value, it should seem that he is at liberty to negotiate it as he finds it con-

venient. Promissory notes given as collateral security were sold in *Lane v. Bailey*, and the pledgee was nevertheless allowed in an action of trover for the conversion to set off the amount of the debt: 47 Barb. (N. Y. 1866) 395; *Fant v. Miller*, 17 Grattan (Va. 1867) 187; *Brightman v. Reeves's Ex'rs*, 21 Texas 70.

Where an agreement confers the right to sell at the maturity of the debt, the pledgee, though he has the right, is not bound to proceed to a sale, and, if before he does sell, the pledge has depreciated in value, he is not liable for its value at the time his right to dispose of it accrued; but only for its value at the time he exercised his right: *Robinson v. Hurley*, 11 Iowa (1860) 410.

In France, by the recent law of May 23d 1868, the article 2078 of the Code Napoléon, which required a judicial sale of the pledge, has been repealed, and the creditor may now sell at public sale on eight days' notice. "Aux termes du nouvel art. 93 du Code de Commerce, le créancier non payé à l'échéance peut, huit jours après une simple signification faite au débiteur et au tiers qui a fourni le gage, s'il y en a un, faire procéder à la vente publique des objets donnés en gage. Toutefois, il ne peut jamais stipuler que le gage lui appartiendra de plein droit, ou qu'il pourra en disposer sans les formalités de la vente publique, laquelle sera faite par ministère de courtier ou d'agent de change." 3 Delol, Code Napoléon 448.

*711] *BARTHOLOMEW and Others v. MARKWICK.
Jan. 7.

The plaintiffs and defendant entered into a treaty for the sale and purchase of a large quantity of furniture, to be paid for half in cash and the residue by bill at six months. A portion of the goods having been delivered the parties disagreed, and the defendant wrote to the plaintiffs as follows:—"The way you do your business will not suit me. I have an account for a large amount of goods not purchased, and a demand made for payment, opposed to treaty. I now close all further orders, and desire what I have not purchased may be taken off my premises":—Held, that the plaintiffs were entitled to treat this letter as a rescission of the contract, and to sue at once upon a quantum valebant for the goods delivered and kept.

THIS was an action for goods sold and delivered. Plea, never indebted.

At the trial before Keating, J., at the sittings at Westminster after last Trinity Term, it appeared that the action was brought to recover the price of certain furniture supplied to an hotel which the defendant was about to open in Hanover Square; the terms on which the goods were sold, being, present payment of *one-half in cash, the remainder by bill at six months*. The first portion of the goods,—which amounted to 88*l.* 17*s.*, after deducting for certain articles not in accordance with the order,—was sent on or about the 8d of April, 1863. The whole supply contemplated would amount to between 600*l.* and 700*l.* The plaintiffs requiring payment or security for the goods already sent, before supplying any more, the defendant on the 17th of April wrote to them as follows:—

"Gentlemen,—The way you do your business will not suit me. I have an account for a large amount of goods not purchased, and a demand made for payment, opposed to treaty. Your salesman well knows my terms: and I now close all further orders, and desire what I have not purchased may be taken off my premises. I will not be responsible for them against damage. MARK MARKWICK."

"I shall settle your amount upon the terms agreed, when corrected. I can but regret my recommendation."

Some further communication took place between the parties; and, on the 21st of April, the defendant wrote to the plaintiffs, as follows:

*712] *—"Gentlemen,—I am surprised at what I have heard, that you demand security for further orders. You will give me cause for this fairly. When you have done so, or upon your doing so, I am ready to close my account upon the terms agreed upon and this day assented to by you. I am willing also to carry out my order in good faith,"—stating certain particulars,—"*and pay also when delivered, upon the same terms as agreed. As to my position, I know it, and what is in my possession in property, and which in three or four months is coming to me. I have no desire to have goods refused to me: but I can do without them. I leave you to carry out in good faith, after reference had from a man of the highest standing: and I desire to know, as is fair to me, what is said of me.*"

"MARK MARKWICK."

On the part of the defendant it was objected that the plaintiffs should have declared upon the special contract, and could not recover on the count for goods sold and delivered, at all events until after the expiration of the six months' credit: and for this was cited Chitty on Contracts, 6th edit. 390.

For the plaintiffs it was submitted that the defendant's letters amounted to a rescision or repudiation of the special contract, and that consequently the plaintiffs were entitled to sue for goods sold: and the following passage from the notes to Cutter v. Powell, 2 Smith's Leading Cases, 4th edit. 15, was relied on,— "It is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it and may, on doing so, *immediately* sue on a quantum meruit for anything which he has done under it previously to the rescision: *this, [*713 it is apprehended, is established by Withers v. Reynolds, 2 B. & Ad. 882, Planché v. Colburn, 8 Bingh. 14 (E. C. L. R. vol. 21), 1 M. & Scott 51, Franklin v. Miller, 4 Ad. & E. 599 (E. C. L. R. vol. 31), and other cases."

The learned judge proposed to allow the plaintiffs to amend their declaration: but they declined to avail themselves of the permission. He then told the jury, that, if they thought the defendant had refused to pay the moiety in cash and to give a bill at the stipulated date for the residue, that would amount to a rescision of the contract, and entitle the plaintiffs to sue on a quantum meruit.

The jury returned a verdict for the plaintiffs, damages 88*l.* 17*s.*

Coleridge, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection.—He referred to Chitty on Contracts, 6th edit. 390, and to the case of Paul v. Dod, 2 C. B. 800 (E. C. L. R. vol. 52).

O'Brien, Serjt., and *H. Matthews*, showed cause.—It may be conceded that it is not every breach of a contract that will entitle one party to it to treat it as being rescinded. It would perhaps be difficult to define the rule more clearly than is done in the note to Cutter v. Powell, 2 Smith's Leading Cases, 5th edit. 34, where it is said that "the breach of contract which entitles the other contractor to rescind, must consist of the non-performance of something essential." Where one of the parties does anything to prevent the obligations of the contract attaching upon him, that amounts to a rescision, according to the principle laid down by the Court of Queen's Bench in Hochster v. De la Tour, 2 Ellis & B. 678 (E. C. L. R. vol. 75). The contract here, as proved by the plaintiffs' foreman, was, that the defendant would pay for the goods, half in cash, the remainder by bill at six months. By his letter of the 17th of April, the *defendant rendered the further performance of that contract impossible, and the plaintiff [*714 was entitled to treat it as rescinded. In Lee v. Risdon, 7 Taunt. 188 (E. C. L. R. vol. 2), where the agreement was that the goods should be paid for by a bill at three months, it was objected that the plaintiff was not entitled to sue for goods sold and delivered before the expiration of the three months, the defendant having refused to accept the bill; but Gibbs, C. J., overruled the objection, holding that, the defendant having by his refusal to accept the bill repudiated the contract, the plaintiff had a right to repudiate it also. In Paul v. Dod, 2 C. B. 800 (E. C. L. R. vol. 52), the contract was entirely performed on the one side: nothing remained to be done on the other side but the payment of the money. [ERLE, C. J.—No doubt, the plaintiff had a

right to say that the contract was at an end: the debateable ground is, whether he was entitled to sue for goods sold and delivered.] To the extent of half the goods, at all events, he was, upon the count on an account stated: *Chisman v. Count*, 2 M. & G. 307, 2 Scott, N. R. 569.

Coleridge, Q. C., and *Griffiths*, in support of the rule.—In *Mussen v. Price*, 4 East 147, it was distinctly held, that, where goods are sold upon a contract that the vendee shall pay for them *in three months, by a bill at two months*, that is a contract for a credit of five months, and therefore that assumpsit cannot be brought at the end of *three months*, upon the neglect of the vendee to give his bill at *two months*,—the vendor's remedy being by a special action on the case for damages for the breach of contract in not giving such bill. In *Chitty on Contracts*, 6th edit. 390, it is said, that, "where by the terms of the contract the goods are to be paid for by a bill of exchange or promissory note, or partly in money and partly in bills, and the vendee refuses to *715] give either, it is necessary to *declare against him specially for such default; and neither the price of the goods nor the amount of the stipulated cash payment can be recovered on the common counts until the period of credit has expired:" for which the following authorities are cited,—*Paul v. Dod*, 2 C. B. 800 (E. C. L. R. vol. 52), *Mussen v. Price*, 4 East 147, *Dutton v. Solomonson*, 3 B. & P. 582, *Swan-cott v. Westgarth*, 4 East 75, *Holt v. Odber*, 11 East 118, *Brooke v. White*, 1 N. R. 330, and *Helps v. Winterbottom*, 2 B. & Ad. 431 (E. C. L. R. vol. 22). In *Paul v. Dod*, A. sold goods to B., to be paid for partly in cash and the residue by bills at intervals of three months each; and it was held that the payment of the money and the delivery of the bills did not constitute a *condition*, so as to entitle A. upon non-payment of the money and non-delivery of the bills to sue as for goods sold and delivered, without waiting the expiration of the credit; and that such action could not be maintained for the amount of the stipulated cash payment, but that A.'s remedy was by special action on the express contract. "No part of the goods," said *Tindal, C. J.*, "can be singled out for payment by cash. The contract was, to pay for the entire goods 30*l.* in cash, and the residue by instalments of 30*l.* at each succeeding three months, to be secured by bills. The plaintiff should have declared upon the special contract, under which the defendants would have been clearly liable. He cannot, however, maintain an action upon an implied contract until the expiration of the period at which the entire debt would have become due." That case has never been overruled or doubted; and it is precisely applicable. There is no pretence for saying there was any contract for any definite amount of goods.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought for goods sold and delivered. It appears that *716] the plaintiffs and defendant *early in April last entered into a treaty for the sale and delivery of a large quantity of furniture, which the defendant was to pay for half in cash and half by bill at six months. Under this contract, certain goods were delivered some of which, to the value of 88*l.* 17*s.*, were retained by the defendant. Disputes then arose between the parties, and on the 17th of April the defendant wrote a letter, in which he says,—“The way you do your business will not suit me. I have an account for a large amount of

goods not purchased, and a demand made for payment, opposed to treaty. I now close all further orders, and desire what I have not purchased may be taken off my premises." Neither cash nor bill was given for the goods kept. No doubt, the plaintiffs could have maintained an action upon the special contract, if the contract had remained open; and for the purposes of this case it is conceded that he could not have sued for goods sold and delivered. But it appears to me that the defendant's letter amounted to a putting an end to the contract, and that the plaintiffs had a right to treat it as rescinded, and to sue for the fair value of the goods which had been delivered and kept. The authorities as to what will amount to such a rescission of a contract as to entitle the plaintiff to sue upon a quantum meruit, were very much discussed during my time in the Court of Queen's Bench, in the case of *Hochster v. De la Tour*, 2 Ellis & B. 678 (E. C. L. R. vol. 75), and in some subsequent cases.^(a) Those authorities, I think, warrant us in holding that the plaintiff was entitled to treat the contract as rescinded, and to sue for goods sold and delivered.

The rest of the court concurring.

Rule discharged.

(a) See *Avery v. Bowden*, 5 Ellis & B. 714 (E. C. L. R. vol. 85), in error, 6 Ellis & B. 943 (E. C. L. R. vol. 88), and *Reid v. Hoskins*, 5 Ellis & B. 729, in error, 6 Ellis & B. 953.

***SMART and Another, Assignees of JOHN LEWIS, a Bankrupt, v. JONES and Others, Executors of ANTHONY HILL, deceased. Jan. 25. [*717]**

A. agreed with B., that B. might dig and carry away cinders from a certain cinder-tip, the property of A., B. paying A. a certain price per ton:—Held, that this agreement need not be by deed.

THE declaration stated, that, before the bankruptcy of the said John Lewis, a certain agreement was made and entered into between the said Anthony Hill and the said John Lewis, which said agreement was and is in the words and figures following, that is to say,—“Memorandum of an agreement made and entered into this 13th day of March, 1862, between Anthony Hill, of Plymouth Iron Works, in the county of Glamorgan, of the one part, and John Lewis, of Cardiff, in the same county, broker, of the other part. The said Anthony Hill agrees with the said John Lewis that he the said John Lewis may dig and carry away cinders from a certain cinder-tip, *the property of the said Anthony Hill*, at New Weir, near Whitchurch, in the county of Hereford, the said John Lewis paying to the said Anthony Hill the sum of 2s. per ton of 2240 lbs. weight, for every ton of cinders so dug and carried away; the accounts between them to be made up and settled every quarter, that is to say, the 1st day of June, the 1st day of September, the 1st day of December, and the 1st day of March in every year; and the money then found to be due to the said Anthony Hill shall then be paid by the said John Lewis. The said John Lewis agrees to leave the sum of 50*l.* already deposited in the West of England Bank as a security for the fulfilment of this agreement, and that the same remain to secure any loss that may be sustained by the said Anthony Hill for any breach or non-performance thereof, and

shall be deposited in the joint names of the said Anthony Hill and John Lewis; that this *agreement may be terminable at any *718] time by one first giving to the other six months' previous notice in writing. And the said Anthony Hill agrees, on the fulfilment and completion of this agreement, and payment of all sums due to him hereunder, to pay over or transfer the said sum of 50*l.* to the said John Lewis. As witness our hands the day and year above written." Averment, that all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action for the breaches hereinafter mentioned; yet the said cinder-tip was not, at the time of the making of the said agreement, or at any time afterwards, the property of the said Anthony Hill, and the said John Lewis could not dig and carry away, and the said Anthony Hill never could authorize him to dig or carry away, cinders from the said cinder-tip; but the said John Lewis was wholly prevented from so doing; whereby the said John Lewis was unable to obtain the said cinders, and lost the profit which he would have made therefrom, and also lost the said sum of 50*l.* and all the use and benefit of the agreement, and was put to great charges and expenses in bringing an action of trespass against the person entitled to the property of the said cinder-tip, and had to discontinue the said action, and to pay the costs thereof: Claim, 2000*l.*

Second plea,—that the said cinder-tip was part and parcel of the land, and of the earth and soil thereof, and that the said agreement was not under seal, nor the deed of the said Anthony Hill.

Demurrer,—the ground alleged in the margin being, that "an agreement for digging gravel, sand, or other part of the soil of land, is perfectly valid though not made by deed." Joinder.

*719] *Gifford* (with whom was *Bovill*, Q. C.), for the *plaintiffs.(a) The plea seems to assume that there is some rule of law which prohibits a man from entering into an agreement to convey an estate or to confer an easement. In the elaborate judgment of Alderson, B., in *Wood v. Leadbitter*, 13 M. & W. 838, the distinction is expressly taken between an action upon the contract and an action which assumes that some interest is conferred. Speaking of *Wood v. Lake*, Sayer J., cited by Gibbs, C. J., in *Taylor v. Waters*, 7 Taunt. 374 (E. C. L. R. vol. 2), 2 Marsh. 551 (E. C. L. R. vol. 4) (where it was held that a beneficial license, to be exercised upon land, may be granted without deed), that learned judge says,—“If the court proceeded on the ground that the plaintiff had acquired the easement by the parol license, we do not think it can be supported. But the case may perhaps have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and, although the action is stated to have been an *action on the case*, it may have been a mere *assumpsit*,—an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“That the plea is bad, because, though an irrevocable license to dig part of the soil cannot be granted without deed, yet a contract about such digging is perfectly valid, so as to entitle a party to sue for breach of contract, though not to claim an interest in the soil; and because a contract, for sufficient consideration, by which a man warrants that he is entitled to a tree, to gravel, or to any other part of the soil, and agrees that the other contracting party may cut the tree or dig the soil, is perfectly good as a contract.”

recover, if the contract was not (and probably the court considered it was not) a contract concerning land, within the 4th section of the Statute of Frauds." That, it is submitted, is an express authority in favour of the plaintiffs' contention *here. This contract is not open to the objection which was held to be fatal in *Bird v. Higginson*, 2 Ad. & E. 696 (E. C. L. R. vol. 29), 4 N. & M. 505. It is a contract for the sale of the cinder-tips, the vendee, being at liberty to dig the cinders for himself. The agreement contains an express warranty that the cinder-tips are the property of the testator. In *Bond v. Rosling*, 1 Best & Smith 371, by an agreement not under seal the plaintiff agreed to let and the defendant to hire certain premises for seven years; and it was further agreed that a good and sufficient lease, embodying the terms of the agreement, should be prepared at the joint expense of the parties: in an action for not accepting a lease, it was held, that, though the instrument was void as a lease, by the 8 & 9 Vict. c. 106, s. 3, it was good as an agreement. "Why," says Blackburn, J., "should the instrument be void because it says, that, until a formal lease is executed, the party going into possession shall be tenant to the party letting him in?" The words of stat. 8 & 9 Vict. c. 106, s. 3, mean no more than that the instrument, not being a deed, shall pass no interest." Wightman, J., said: "This instrument is void as a lease; but it contains a valid agreement." And Cockburn, C. J., said: "The statute 8 & 9 Vict. c. 106, s. 3, makes void that part of the agreement which would operate as a present demise, but leaves an agreement to take a lease."

Coleridge, Q. C. (with whom was *Coxon*), *contra*. (a)—The agreement declared upon is wholly inoperative *unless it is treated as an agreement with reference to a profit à prendre: and, if that be so, it is clearly void for not being under seal. The declaration is not for not granting, but for obstructing the bankrupt in the enjoyment of that which the agreement professed to grant. Whether the testator had or had not the right to grant, is wholly immaterial. *Stratton v. Pettit*, 16 C. B. 420, is expressly in point. There, by articles of agreement between A. and B., it was witnessed that A. agreed to let and B. agreed to take certain premises then in the possession of B., for the term of five years; and A. also agreed to sell and B. agreed to purchase the fee-simple of the premises, to be conveyed to B. his heirs, &c., absolutely, at the end of the said five years, provided B., his heirs, &c., should have in the meantime quietly occupied and not have been evicted from the premises; yielding and rendering by B. unto A., as well for the rent or use of the said premises for five years, as for the said purchase thereof, 70*l.* in and by seventy shares of 1*l.* each in the Birkbeck Life Assurance Company, the receipt and delivery unto A. of the said shares of the value of 70*l.*, in full for the said rent and purchase, A. thereby admitted: and it was further agreed, that, should B. be legally ejected from the premises within or

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the alleged agreement is for the enjoyment of a profit à prendre, by taking parcel of the soil, and, in order to be valid, it ought to have been under seal:

"2. That a profit à prendre can only be granted by deed:

"3. That, the alleged agreement not being under seal, no action will lie upon it for non-enjoyment of the profit à prendre:

"4. That there is no warranty of title, and, in the absence of fraud, no cause of action."

during the term of five years, A. should pay or refund to B., either in cash or in the said shares, at and after the rate of 7l. 10s. per annum for the portion of the term unexpired at the time of such eviction, and that A. should also indemnify B. against all loss and expense in maintaining possession: and it was further agreed that no *722] abstract or investigation of title should *be permitted or required beyond evidence of the seisin and possession as owner by A. and his ancestors for twenty-one years and upwards last past; and that B. should *immediately* do and execute all acts necessary to transfer and vest the said seventy shares in A. It was held that the intention of the parties, to be collected from the language of the instrument, was, that it should take effect as a *lease*, and consequently that it was void as such by the 3d section of the 8 & 9 Vict. c. 106, not being by deed. [WILLES, J., referred to *Tress v. Savage*, 3 Ellis & B. 36 (E. C. L. R. vol. 77).] In *Tooker v. Smith*, 1 Hurlst. & N. 732, an agreement for a lease of a farm contained a stipulation that the tenancy should continue until after two years' notice to quit had been given. The tenant occupied the farm, and paid rent for some years, but no lease was executed. It being held that this instrument could not enure as a lease, the question arose whether it could operate as a tenancy from year to year upon the terms of the written instrument, one of which was that the land should be cultivated according to the four-course system: and it was held that it might. [WILLES, J.—Do you contend that the defendants would not have been liable to an action upon this agreement, if they had by locking a gate prevented the bankrupt from getting at the cinder-tips?] *Wood v. Leadbitter*, 13 M. & W. 838, shows that they would not. [WILLIAMS, J., referred to *Smith v. Neale*, 2 C. B. N. S. 67 (E. C. L. R. vol. 89).] It might be that an action would lie against the testator for not having granted that which he professed to grant. But here it is assumed that there was a grant. If the contract could not by law pass the authority it professes to grant, the plea is a good answer to the declaration.

Gifford was not called upon to reply.

*723] *ERLE, C. J.—I am of opinion that our judgment must be for the plaintiffs. I have been unable to see any of the difficulties which some of my learned Brethren seem to have felt in reference to the authorities. It seems to me to be simply a question whether, where a party has entered into a valid contract, and has broken it, an action will lie for such breach. It does not need much authority to dispose of that question. The testator agreed with Lewis that Lewis might dig and carry away cinders from a certain cinder-tip, which is described as the property of the testator; and when Lewis, in pursuance of the agreement, went to the place to exercise his right under the agreement, he was prevented from doing so. Suppose the place where the cinders were had been fenced round, and the gate giving access to it had been locked, and the agreement had been, that, in consideration of certain payments to be made by Lewis, the testator promised that the gate should be open so that Lewis might enter and take the cinders, it would be quite immaterial whether the gate was locked by the testator or by a third person. A man may if he pleases contract to sell another man's goods, or to do a thing which he can-

not do; still, if he makes the contract or promise, he is liable for the breach of it. If this had been a contract for an interest in land, or a license for the exercise of some right on the land, I should have found it necessary to consider the authorities which have been referred to. But, if the testator, for a good consideration, has made a promise, and has broken it, an action clearly lies for that breach.

WILLIAMS, J.—I am of the same opinion. I do not mean to throw any doubt upon the cases which have been decided on this subject, or to say, that, supposing Hill had a right to grant Lewis permission to dig and *carry away cinders from the cinder-tip, anything beyond a license to enter upon the land for the purpose of taking [*724 away the cinders would be conferred by the agreement. But I entirely agree with my Lord in the construction which he has put upon the instrument; and I think the declaration discloses a breach of it, for which an action will lie. It might be said that the plea amounts only to an allegation that Hill had no authority to make the grant, and that the plaintiffs might try the right by going and taking the cinders under the authority of Hill. But that view of the case is answered by the decisions which establish, that, in the case of a parol lease, he who lets agrees to give possession, and, if he fails to do so, the lessee may recover damages against him, and is not driven to bring an ejectment. That was decided in *Coe v. Clay*, 5 Bingh. 440 (E. C. L. R. vol. 15), 3 M. & P. 57, and confirmed by *Jinks v. Edwards*, 11 Exch. 775.

WILLES, J.—I am of the same opinion. If this had been a parol agreement, a difficulty would have arisen, not with reference to the rule of law that a grant of an incorporeal hereditament ordinarily, but not always, must be under seal, but with reference to the Statute of Frauds. It would have been like an agreement for the purchase of a part of the natural fruits of the land, in which case it is held that the statute applies, but contra of artificial fruits, which have been dealt with as chattels. It appears to me that in this case no difficulty at all arises with reference to the common-law rule as to the grant of an incorporeal hereditament, and for this reason, because the plaintiffs do not assert that they are entitled to any actual interest enabling Lewis to enter upon the land. They rely upon an agreement whereby the supposed owner of the cinders says that Lewis may dig and carry away the cinders, which *necessarily involves the right to enter for the purpose of doing [*725 so; as, if there were a grant of a tree or other natural fruit of the land, that would carry with it an irrevocable authority to enter upon the land for the purpose of cutting down and carrying away the tree. But that is not what the plaintiffs here rely on. What they rely on, is, an agreement that Lewis may dig and carry away the cinders. If that is to be construed to mean merely that the seller is not to interfere actively to prevent the purchaser from taking the cinders, there is an end of the matter: so, if this had been a mere license, without consideration. But this is an agreement, for a valuable consideration. The buyer in the first instance parts with 50*l.*: therefore it is necessary to put upon the agreement a more extensive because a more reasonable construction, of which it is well susceptible. The seller agrees that the buyer shall have the article contracted for; and the

latter, through the default of the former, has been unable to obtain it,—the seller having no title: and so the buyer has lost the profit he would have made and his 50%. Had this been a case in which the plaintiffs alleged an irrevocable authority by reason of the contract for the sale of the cinders, there might have been a difficulty; because the sale was not, as in the cases to which we have been referred, a sale of a specific chattel lying upon the land of the seller, which would, as I conceive, give an irrevocable authority to the buyer to enter and take the thing: but, taking the declaration and the plea together, it was a right to take certain cinders constituting part of a heap which had become a portion of the soil. Such a right as that may come within, and does appear to me to come within, the law as contended for by Mr. Coleridge: and such a license as that would seem to be one which requires a grant,—like a license to work a mine. But, *726] long before you *arrive at that difficulty, the plaintiffs' case is founded upon a contract, and the breach of it, not alleging any fixed interest in an incorporeal hereditament, but alleging that the vendee has not had that which he bargained for, and that by reason of a breach of contract on the part of the seller. For that breach an action may well lie.

KEATING, J.—I am of the same opinion. The declaration upon the face of it shows a contract which need not be under seal. It shows a contract whereby the testator for a good consideration agreed that the bankrupt should have liberty to dig and carry away the cinders; and it goes on to allege, that, by the testator's default, he was prevented from so doing. That is a perfectly good contract. And the demurrer must prevail. Judgment for the plaintiffs.

BARBER and Others v. THE NOTTINGHAM AND GRANTHAM RAILWAY AND CANAL COMPANY. Jan. 20.

By a canal act commissioners were appointed for "settling, determining, and adjusting" all questions, matters, and differences between the company and the owners of lands, &c., prejudiced by the execution of any of the powers thereby granted: and by a subsequent section the amount of compensation was to be assessed by a jury, and the commissioners were to give judgment for the sum so assessed, which was to be "binding and conclusive to all intents and purposes:"—Held, that the verdict and judgment were conclusive as to the amount, but not as to the claimant's right to compensation.

THIS was an action to recover the amount awarded by commissioners under a canal act, for damages sustained by an adjoining mine-owner in consequence of the alleged improper construction of the company's reservoir.

*727] The first count of the declaration stated, that, *whereas the plaintiffs, before and at the time of the happening of the damage and injury thereafter mentioned, were, and since had been and still were, the owners and occupiers of and interested in certain lands, coal-mines, and hereditaments situate in the parish of Greasley, in the county of Nottingham, known as High Park Colliery, and near to a reservoir situate in the parish aforesaid, in the county aforesaid, and which said reservoir had been theretofore made and was at the time of the said damage and injury maintained under and by virtue of the

provisions of an act of parliament made and passed in the 32d year of the reign of His late Majesty, King George the Third (32 G. 2, c. c.), intituled "An act for making and maintaining a navigable canal from the Cromford Canal, in the county of Nottingham, to or near to the town of Nottingham, and to the river Trent, near Nottingham Trent Bridge, and also certain collateral cuts therein described from the said intended canal;" and the plaintiffs therefore, to wit, the 20th of December, 1862, by the consideration and judgment of commissioners for the time being for the purposes in the said act mentioned, having jurisdiction in that behalf, and such application and all such proceedings necessary in that behalf having been duly had and taken, recovered against the defendants, by virtue of the said act and of "The Ambergate, Nottingham, and Boston, and Eastern Junction Railway Act, 1846" (9 & 10 Vict. c. clv.), and of "The Nottingham and Grantham Railway and Canal Act, 1860" (23 & 24 Vict. c. xxxvi.), the sum of 4992*l.* 3*s.* 10*d.*, the same being the amount of the recompense duly and in all respects conformably to the said act inquired of, assessed, and ascertained as the recompense to be made to the plaintiffs by the defendants for damage sustained by the making and maintaining of the said reservoir, and for *damage sustained by the flowing, leaking, and oozing of the water of the said reservoir over and through [728 the banks of the same into and upon the said lands, mines, and hereditaments, and by reason of the execution by the defendants of the powers in the said first-mentioned act contained: Breach, that, although all things had been done and had happened, and all times had elapsed necessary to entitle the plaintiffs to maintain this action, and although the verdict of the said jury in the premises, and the said judgment, being the judgment thereupon duly pronounced by the said commissioners, were respectively duly signed by the said commissioners, and transmitted to the clerk of the peace for the county of Nottingham by the said commissioners, the defendants had not paid the said sum of 4992*l.* 3*s.* 10*d.*, or any part thereof, to the plaintiffs, and the same sum was still due and in arrear and unpaid, contrary to the said statutes.

The second count stated that, after the said verdict and judgment had been respectively given as in the first count mentioned, and after the said verdict so given as in the said first count mentioned had been given, as the fact was and is, for more money as a recompense for the said damage in the said first count mentioned so done as in the said first count mentioned to the said lands, mines, and hereditaments of the plaintiffs than had been previously offered by or on behalf of the defendants, the said commissioners duly, in accordance with the provisions of the said act in that behalf, settled the expenses, by them according to the said act in such case to be settled, at 372*l.* 1*s.* 8*d.*, to be defrayed by the defendants, whereof the defendants had all due and proper notice; and, though all things were done and happened, and all times elapsed, and conditions were fulfilled, necessary to entitle the plaintiffs to maintain this action, yet the defendants *had not defrayed the said [729 expenses, or any part thereof. Claim 6000*l.*

Third plea,—as to the whole of the declaration,—that the said damage in the first count mentioned to have been sustained was not sustained by the making or maintaining of the said reservoir, or by the flowing, leaking, or oozing of the water of the said reservoir over or

through the banks of the same, or by reason of the execution by the defendants of the powers in the said first-mentioned act contained, within the meaning of the 35th section of the said statute, whereby the said commissioners had not jurisdiction under the said act to assess the said damage or to settle the said expenses.

Fourth plea,—as to the whole of the declaration,—that the said alleged damages were caused by the flowing, leaking, and oozing of the said water of the said reservoir through certain beds and strata of stone and minerals which formed the natural sides and bottom of the said reservoir, and which were not part of the artificial banks of the same, and that the same were not caused in any other manner whatsoever, or, except as aforesaid, by the making or maintaining of the said reservoir, or by reason of the execution by the said canal company or the defendants of the powers in the said first-mentioned act contained; that it was not proved at the holding of the said inquisition, or found by the jury, that the said flowing, leaking, and oozing of the said water arose or happened by or through the act or default of the defendants or of the canal company mentioned in the said first-mentioned act; and that the fact was and is that the same arose and happened without any such act or default, and was caused by the acts of the plaintiffs themselves, in sinking certain shafts and pits in their said
 *780] land and coal-mines, and so causing large quantities of water which naturally lay and were contained in the underground beds and strata and stone and minerals in which the said shafts and pits were sunk, and which beds and strata were situate between the said shafts and pits and the said reservoir, and formed the natural sides and bottom thereof, to flow, leak, and ooze, without the default or knowledge of the defendants or of the said canal company, from and out of the said reservoir through the said natural sides and bottom thereof, and to percolate into and through the said beds and strata and into the said shafts, pits, and mines.

The plaintiffs demurred to the third and fourth pleas, the ground of demurrer stated in the margin being, "that it appears upon the record that the defendants are estopped by the judgment in the first count mentioned from averring the several matters alleged in the third and fourth pleas." Joinder.

The plaintiffs also replied to the third and fourth pleas, that the defendants ought not to be admitted or received against the said record in the first count mentioned to plead the said pleas, because the plaintiffs said that a jury duly summoned and impannelled according to the provisions of the said 35th section did duly and according to the said provisions inquire of, assess, and ascertain the said recompense; and that the said commissioners, being the commissioners for settling, determining, and adjusting all questions, matters, and differences arising between the defendants and the plaintiffs as such proprietors of and interested in the said lands in the first count mentioned, as in and by the said act of parliament provided, duly and according to the provisions of the said act gave the said judgment for the said recompense in the first count mentioned, as therein mentioned; and
 *781] that the matters and things in the third and fourth pleas alleged were before and at the time of the said application and proceedings, verdict, and judgment, questions and matters in difference

between the plaintiffs as such owners of and interested in the said lands and the defendants, within the meaning of the said act.

The defendants demurred to the second replication to the third and fourth pleas,—the ground stated in the margin being, “that the defendants are not estopped by the verdict and judgment in the first count mentioned from pleading the said third and fourth pleas.” Joinder.

Field (with whom was *Hayes*, Serjt.), for the plaintiffs.(a)—Two substantial points are presented for the decision of the court,—first, whether the verdict and judgment of the jury and the commissioners under the act are conclusive,—secondly, whether the fourth plea shows any answer to the plaintiffs’ claim, upon the assumption that the verdict and judgment are not conclusive.

1. The verdict and judgment, it is submitted, are conclusive. It will not be necessary to call in question the cases which have decided that the verdict of a jury or the award of an arbitrator or umpire under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, ss. 21, 68, merely ascertains the *amount*, not the claimant’s *right* to compensation: *The Queen v. The *London and North Western Railway Company*, 3 Ellis & B. 448 (E. C. L. R. vol. 77); [*782 *Chapman v. The Monmouthshire Railway and Canal Company*, 2 Hurlst. & N. 267; *Read v. The Victoria Station and Pimlico Railway Company*, 1 Hurlst. & Colt. 826; *In re Newbold and The Metropolitan Railway Company*, 14 C. B. N. S. 405 (E. C. L. R. vol. 108). These cases have decided that it is still open to the company to contest the verdict or the award, if they can show that the claimant is not entitled to the land in respect of which the compensation is claimed, or, perhaps, that he has not sustained the damage complained of. But, under this act, the commissioners and the jury had jurisdiction not only over the amount of damage, but also over the question whether the claimant had sustained damage or not. The 1st section recites that the making and maintaining the intended canal and cuts “will open an easy communication between several valuable mines of coal and the town of Nottingham,” and it incorporates the company, and empowers them to make the intended canal and cuts, and also to make “one or more reservoir or reservoirs, and to erect one or more fire-engine or engines, or other machines, for the purpose of supplying the said intended canal and collateral cuts with water, and also such and so many feeders, aqueducts, and channels as they shall think fit, for supplying the said intended canal, collateral cuts, and reservoirs with water,”—“doing as little damage as may be in the execution of the several powers to them thereby granted, and making satisfaction in manner thereafter mentioned to the owners or proprietors of and other persons interested in any lands, tenements, or other hereditaments, waters, &c., which shall be taken, used, removed, diverted, or prejudiced, for all damages to be by them sustained in or by the exe-

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. The plaintiffs will contend that the defendants are estopped by the verdict and judgment in the first count mentioned from pleading the said third and fourth pleas, and will rely upon the replication by way of estoppel, as well as upon the demurrer:

“2. The plaintiffs will also contend that the fourth plea is bad, because it admits that the damage was caused by the water flowing and seeping out of the reservoir, and was therefore matter for compensation.”

cution of any of the powers of this act." The 3d and 4th sections again *refer to mines. The 26th provides that certain persons *733] named, and their successors, to be elected in manner therein after (s. 27) mentioned, "shall be and are hereby appointed commissioners for settling, determining, and adjusting, all questions, matters, and differences which shall or may arise between the said Nottingham Canal Company and the several proprietors of and persons interested in any lands, grounds, or other hereditaments, mills, or waters, that shall or may be affected or prejudiced by the execution of any of the powers hereby granted, and for the settling or determining whereof no other mode is by this act provided," &c. The 32d section provides for notice of the meetings of the commissioners: and the 35th section, upon which this question will turn, enacts "that the said commissioners are hereby authorized and empowered by writing under their hands and seals, with the consent of the parties concerned, to determine and adjust from time to time what sum or sums of money shall be paid by the said Nottingham Canal Company, either by an annual rent or payment, or by a sum of money in gross, to and at the election of such bodies politic, corporate or collegiate, or any person or persons respectively who shall be so entitled or interested as aforesaid [s. 24], for the absolute purchase of the lands, grounds, or other hereditaments which shall be set out and ascertained for making the said intended canal, collateral cuts, and towing-paths, or any part thereof, and other the purposes herein mentioned; and also to determine and adjust what other distinct sum or sums of money shall be paid by the said Nottingham Canal Company as a recompense for any damages which may or shall be at any time or times sustained by any such bodies politic, corporate, or collegiate, or by any person or persons respectively, being owners of and interested in any lands, grounds, *734] mills, waters, or *other hereditaments, for or by reason of the severing or dividing the same, or the making, maintaining, or repairing the said intended canal and collateral cuts, reservoirs, aqueducts, feeders, trenches, passages, gutters, water-courses, roads, ways, or sluices, or supplying the same or any of them with water as aforesaid, or by altering, diverting, taking away, or using any springs, streams of water, or water-courses flowing to or supplying with water any mill, or any engine for the working or getting of coals or other minerals, or by the flowing, leaking, or oozing of the water over or through the banks of the said intended canal and collateral cuts, reservoirs, trenches, or sluices, or over or through any passages, gutters, or water-courses which shall be made pursuant to the powers hereby given for conveying or communicating water to or from the said intended canal or collateral cuts, or by not cleansing the said water-courses, trenches, or passages, or by turning or diverting any streams or brooks into the same, or by reason or means of the execution of any of the powers herein contained, by the said Nottingham Canal Company, or by their agents, workmen, officers, or assistants, in case such price or value, damage, and recompense respectively cannot be settled, adjusted, or agreed for by and between the said Nottingham Canal Company or their agent or agents and such proprietors of or persons interested in the said lands, grounds, mills, or hereditaments as aforesaid: and if the said Nottingham Canal Company, or any such

body politic, corporate, or collegiate, or other person or persons so interested or entitled as aforesaid shall refuse or neglect to submit any such matter to the determination of the said commissioners, for the space of fourteen days after being applied to for that purpose on behalf of the said Nottingham Canal Company, or shall be dissatisfied with any determination which *shall be by them made as [735 aforesaid, or if any such body politic, corporate, or collegiate, trustee or trustees, or any other person or persons as aforesaid, shall refuse to receive, upon due tender thereof made, such purchase-money, or the first payment of such annual rent, or such recompense as shall be so determined to be paid, or shall, upon notice in writing given to the principal officer of any such body politic, corporate, or collegiate, or to such trustee or trustees, person or persons, respectively, or left at the last or usual place or places of his, her, or their abode, or with the tenant or tenants, occupier or occupiers of such lands, grounds, mills, waters, or other hereditaments, for the space of fourteen days next after such notice, neglect, or refusal to treat, or shall not agree with the said Nottingham Canal Company, or by reason of absence shall be prevented from treating, or, through disability by nonage, coverture, or other impediment, cannot treat for themselves or make such agreement as shall be necessary for the purposes aforesaid, or shall not within the before-mentioned space of fourteen days, produce and evince a clear title to the premises which they are or shall be in the possession of, or to the interest which they claim therein, then and in every such case the said commissioners shall and are hereby empowered and required to issue a warrant under their hands and seals to the sheriff of the county of Nottingham, or to the sheriffs of the town and county of the town of Nottingham (in which the matter in question shall arise); and, in case any such sheriff or sheriffs, or his or their undersheriff, shall happen to be one of the said Nottingham Canal Company, or enjoy any office of profit or trust under them, or shall be otherwise interested in the matter in question, then to the coroner of the said county or town and county, not interested as aforesaid, commanding such sheriff or sheriffs, or *coroner, respectively, to impanel, [*736 summon, and return a jury; and the said sheriff or sheriffs, or coroner, is and are hereby required accordingly to impanel, summon, and return a jury of twelve sufficient and indifferent men, qualified according to the laws of this realm to be returned for the trials of issues in His Majesty's courts at Westminster, to appear before the said commissioners at such time and place as in such warrant shall be appointed, not being less than nine nor more than twenty-one days after such warrant shall be served upon the said sheriff or sheriffs or coroner; and in case a sufficient number of jurymen shall not appear at the time and place so to be appointed as aforesaid, the said sheriff or sheriffs, or coroner, shall return other honest and indifferent men of the standers-by, or that can speedily be procured to attend that service (being so qualified as aforesaid), to make up the said jury to the number of twelve; and all parties concerned may have their lawful challenges against any of the said jurymen, but shall not challenge the array; and the said commissioners are hereby empowered to summon and call before them all and every such person and persons who shall be thought necessary to be examined as a witness or witnesses touch-

ing the matters in question; and the said commissioners may order and authorize the said jury, or any six or more of them, to view the place or places or matters in question, which jury upon their oaths (which oaths, as well as the oaths to such person or persons as shall be called upon to give evidence, the commissioners are hereby empowered to administer), shall *inquire of, assess, and ascertain* the sum of money or annual rent to be paid for the purchase of such lands, grounds, mills, waters, or other hereditaments, or the recompense to be made for the damages that may or shall be sustained as aforesaid, and shall assess separate *damages for the same, and *the said commissioners shall give* *737] *judgment* for such purchase-moneys, rent, or recompense so to be assessed by such jury, *which said verdict, and the judgment thereupon pronounced* as aforesaid, shall be signed by the said commissioners, and *shall be binding and conclusive to all intents and purposes* against all bodies politic, corporate, or collegiate, and all other persons whomsoever, and shall not be removed by a certiorari or other process into any of His Majesty's courts of record at Westminster, or any other court, any law or statute to the contrary hereof notwithstanding." And by s. 40 the verdict and judgment of the jury and commissioners is to be recorded with the clerk of the peace. The record showing that the commissioners were acting in a matter which was within their jurisdiction, upon the principle laid down by the Court of Queen's Bench in *The Queen v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41), 4 P. & D. 679, their decision is final. They are (by s. 26) appointed a court "for settling, determining, and adjusting all questions, matters, and differences" which shall or may arise between the company and the persons interested in lands or hereditaments that shall or may be affected or prejudiced by the execution of any of the powers thereby granted. *Allen v. Sharp*, 2 Exch. 352, comes very near to the present case. An assessment under the assessed-tax acts is final and conclusive, unless appealed against in the manner prescribed by the 43 G. 3, c. 99, s. 24: therefore, where a party was assessed to the duty imposed on "horse-dealers," it was held that the decision of the assessor that the party was a horse-dealer, however erroneous, could not be questioned in an action. Parke, B., in giving judgment there, relies very much upon the case of *The Earl of Radnor v. Reeve*, 2 Bos. & P. 391, where the court say "that it had been determined by all the judges of *738] England, *that, when a statute provides that the judgment of the commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way." That principle has been adopted in many recent cases: see *Mould v. Williams*, 5 Q. B. 469 (E. C. L. R. vol. 48), D. & M. 631; *The Queen v. The Inhabitants of Hickling*, 7 Q. B. 880 (E. C. L. R. vol. 53); *Thompson v. Ingham*, 14 Q. B. 710 (E. C. L. R. vol. 68); *The Queen v. Dayman*, 7 Ellis & B. 672 (E. C. L. R. vol. 90); *Williams v. Adams*, 2 Best & Smith 312 (E. C. L. R. vol. 110).

2. The fourth plea in substance alleges that the damage complained of was occasioned by the plaintiffs' own acts and default. That plea clearly discloses in itself no answer to the declaration. The interference by the defendants with the natural flow of the water, so as to throw an increased burthen on the plaintiffs, constitutes a clear cause of action: *Tenant v. Goldwin*, 1 Salk. 360, 2 Ld. Raym. 1089; *Cooper*

v. Barber, 3 Taunt. 99; *Hodgkinson v. Ennor*, 32 Law J., Q. B. 231; *Baird v. Williamson*, ante, p. 377.

Mellish, Q. C., contra(a)—The first question is, whether the verdict of the sheriff's jury, and the judgment of the commissioners thereon, be conclusive as to the *right of the plaintiff to damages. It is submitted that they are conclusive only as to the *amount* of [*789 damage, but not as to the fact that damage has been sustained. The decisions upon the Lands Clauses Consolidation Act did not turn upon the words of the particular act, but upon the general principles which govern the construction of all acts which are in *pari materia*. The right to compensation may often depend upon nice and difficult questions of law: and the legislature never could have intended that these should be disposed of by a sheriff's jury. The plaintiffs, it is submitted, can only be entitled to compensation in respect of that for which they could have maintained an action independently of the act of parliament. As regards the Lands Clauses Consolidation Act, the question may now be considered to be settled. The case of *The Queen v. The Metropolitan Railway Company, Ex parte Horrocks*, 8 Law T. N. S. 663, may be added to the list of cases already referred to. In *Read v. The Victoria Station and Pimlico Railway Company*, 1 Hurlst. & Colt. 826, a plea in the very words of the third plea here was held good. There is no material distinction between the language of the provisions of that act and that of the act now under consideration. [ERLE, C. J.—By s. 35 of the 32 G. 3. c. c., the verdict and judgment are to be "binding and conclusive to all intents and purposes" against all persons.] That is, binding and conclusive as regards the matter submitted to the jury, not as to that which is not submitted. Those words, therefore, carry the matter no further.

1. Assuming, then, that, unless an action could have been maintained if there had been no act of parliament, the case is not one for compensation under the act,—would an action have lain against the defendants for doing what they did here? For some *purpose [*740 of profit, the canal company make a reservoir upon their own land. Some time afterwards, a mine-owner sinks a shaft at some distance from the reservoir. The nature of the strata between the bottom of the reservoir and the shaft is such that there is water therein; and, when the mine-owner draws the water off, water from the reservoir percolates into the mine. The question is, whether that is a cause of action. Neither the making nor the keeping the reservoir was a wrongful act. The case is extremely analogous to that of *Chasemore v. Richards*, 7 House of Lords Cases 349, where it was held that the principles which regulate the rights to the enjoyment of water running in a natural channel on the surface, do not apply to water percolating through underground strata. [WILLIAMS, J.—There is nothing in the

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the defendants are not estopped from showing that the commissioners had not jurisdiction to assess the damage in the first count mentioned; and that they are entitled to judgment on the third plea, inasmuch as the plaintiffs by their demurrer to that plea admit that the damage was not within the 35th section of the 32 G. 3, c. c.:

"2. That the defendants are not bound to make compensation to a mine-owner whose own operations caused the damage, and the same not being caused by the act or default of the defendants; and that they are not estopped from setting this up as a defence, and are therefore entitled to judgment on the fourth plea."

and the proprietors of lands, &c., that shall be affected or prejudiced by the execution of any of the powers thereby granted. The amount of compensation necessarily depends upon whether or not it was water from the reservoir that found its way into the plaintiffs' mine. In *The Queen v. The Lancaster and Preston Junction Railway Company*, 6 Q. B. 750 (E. C. L. R. vol. 51), by a railway act (7 W. 4 & 1 Vict. c. xxii.), it was enacted, that, for settling differences between the company and owners of land, the company should issue a warrant commanding the sheriff to impanel, &c., a jury, which jury should "inquire of, assess, and give a verdict for the sum of money to be paid," "by way of satisfaction or compensation," "for the damages" sustained from the company's acts. The company issued their warrant to the sheriff, commanding him to impanel a jury "for the purpose of inquiring of, assessing, and giving a verdict for the sum of money (if any) to be paid" to C. "by way of satisfaction or compensation" "for the damages (if any) which shall have been done," &c. It was held that it was competent to the jury to decide that *no* damage had been sustained. The distinction seems to turn upon this, whether the fact in contest is part of the jurisdiction. [WILLES, J.—Or a condition precedent to the jurisdiction attaching.] Where the jurisdiction is limited as to person or area, the question whether the person or the area is within it, is not delegated by the legislature to the inferior tribunal. *The Queen v. The Lancaster and Preston Junction Railway Company* received confirmation in *Bradby and The Southampton Local Board of Health*, 24 Law J., Q. B. 230. Is a new jury to open the whole question whether damage to the amount of 1*l.* has been occasioned to the plaintiffs from the improper construction of the defendants' *reservoir? In the event of the jury *745] in this action finding damage to the extent of 1*l.*, the plaintiffs will undoubtedly be entitled to the whole sum awarded by the judgment of the commissioners. Reading the latter part of s. 26 together with s. 35, it is plain that whether the party claiming has or has not sustained damage, and to what extent, must be a matter within the jurisdiction of the jury and the commissioners.

ERLE, C. J.—I am of opinion that our judgment should be for the defendants upon the demurrer to the third plea, and for the plaintiff upon the demurrer to the fourth plea. The action is brought to recover a sum awarded by a compensation jury under a canal act of 32 G. 3, c. c. The declaration sets out the verdict of the jury and the judgment of the commissioners who are appointed under the act (s. 26) "for settling, determining, and adjusting all questionous matters, and differences which shall or may arise between the company and the several proprietors of and persons interested in any lands, grounds, or other hereditaments, mills, or waters that shall or may be affected or prejudiced by the execution of any of the powers hereby granted, and for the settling or determining whereof no other mode is by this act provided." The 35th section of the act empowers the commissioners, with the consent of the parties concerned, to determine and adjust the amount of recompense due for damage sustained; and, if the parties do not consent, a jury is to be impanelled to assess such damages, and the commissioners are to give judgment for the amount so assessed: and it is enacted that such verdict and judgment "shall

be binding and conclusive to all intents and purposes against all bodies politic, &c., and all other persons whomsoever, and shall not be removed by certiorari," &c. The verdict is *for the amount of damage done to the plaintiffs' mine by the flowing, [746 oozing, and leaking of the water from the defendants' reservoir into the mine. The third plea is, that the damage complained of was not sustained by the making or maintaining of the reservoir, or by the flowing, leaking, or oozing of the water of the reservoir over or through the banks of the same, or by reason of the execution by the defendants of the powers in the act contained, within the meaning of the 35th section, and therefore neither the jury nor the commissioners had any jurisdiction. I am of opinion, upon the authorities which have been decided upon the construction of the Lands Clauses Consolidation Act, 1845, that this is a good plea. In *The Queen v. The London and North Western Railway Company*, 3 Ellis & B. 443 (E. C. L. R. vol. 77), it was held that a compensation jury under that statute is to fix the amount of compensation, if the claimant be entitled to compensation, but cannot go into the question of title. I am aware that the question was there raised upon a right of way. But, in *Read v. The Victoria Station and Pimlico Railway Company*, 1 Hurlst. & Colt. 826, the Court of Exchequer came to the conclusion that the verdict and judgment upon an inquisition under the compensation clauses of that act, do not estop the company, in an action upon the judgment, from denying that the lands in respect of which the damage has been assessed, and the plaintiff's interest therein, were damaged or injuriously affected by their works. If the company chooses to deny that there has been either damnum or injuria, that question may be raised by plea in an action upon the judgment. I feel the full force of Mr. Field's argument: if upon the trial of this issue the jury shall find that the plaintiffs have sustained any damage whatever, even to the extent of 1s., they will be entitled to the whole sum awarded by the *judgment of the commissioners. It [747 seems to me, therefore, to be a very unsatisfactory mode of ascertaining the rights of the parties. I entertained a different opinion from the rest of the Court of Queen's Bench upon this matter formerly: (a) but the line of decisions since has been uniformly in conformity with the opinion of the majority; and it is now clearly settled that the verdict of the jury fixes the amount of the damage, but not the claimant's right to compensation. It may be that the plaintiffs in this case may only be able to prove before another jury leakage from the reservoir into their mine to the extent of a single tun: but still the company must pay 4992*l.* 3*s.* 10*d.* for that damage. The third plea, therefore, is a good plea within all the cases which have been decided upon the construction of the Lands Clauses Consolidation Act. Is there, then, any distinction between the language of that act and that of the act now under consideration? I can discover none that I can rely on. The commissioners are by s. 26 appointed to determine all differences which may arise between the company and the proprietors or persons interested in any lands, &c., which may be affected or prejudiced by the execution of the powers conferred by the act: and

(a) In *The Queen v. The London and North Western Railway Company*, 3 Ellis & B. 443 (E. C. L. R. vol. 77).

then the 35th section provides the machinery by which the commissioners are to adjust the compensation, viz. by their own award if the parties consent; otherwise, by the assessment of a jury,—which with the judgment of the commissioners thereon, is to be binding and conclusive “to all intents and purposes” against all parties. It seems to me that there is throughout a condition to the attaching of the jurisdiction of this inferior tribunal, not only that the party claiming *748] compensation *must be the proprietor of or interested in the land, but also that the land shall have been affected or prejudiced by the execution of the powers of the act. The verdict and judgment are conclusive only as to the amount: whether the party claiming is interested in the land, or whether the land has been injuriously affected, must be tried in an action upon the judgment.

The fourth plea appears to me to be a bad one. The substance of that plea I take to be this, that the flowing, leaking, and oozing of the water from the reservoir into the plaintiffs’ mine, arose, not from any act or default of the defendants, but by the sinking of the plaintiffs’ shaft, which from the porous nature of the substrata caused the water to leak from the reservoir without the defendants’ default or knowledge. I think the plea is a bad one. The act of parliament has given large powers to the company authorizing them to collect water from all available sources and accumulate it in reservoirs for the purpose of feeding their canal, doing as little damage as possible, and making compensation for all injuries arising, inter alia, by “the flowing, leaking, or oozing of water over or *through* the banks of the intended canal and collateral cuts, reservoirs,” &c. The words are very general. If the company take the privileges conferred upon them by the act, they must take them with the liability which the legislature has thought fit to impose upon them. The distinction attempted to be set up by the plea, between a leakage through the natural soil, and a leakage through banks artificially formed, is not, I think, warranted by the language which the legislature has used. Whether the leakage arises from the deficiency of an artificial bank, or from the pressure of accumulated waters upon the soil as left by the hand of nature, *749] makes no difference, in my opinion. *Those natural strata are banks within the meaning of the statute.

WILLIAMS, J.—I am of the same opinion.

WILLES, J.—I am of the same opinion. It appears to me, that, as the authorities stand, the judgment of the Court of Exchequer in *Read v. The Victoria Station and Pimlico Railway Company*, 1 Hurlst. & Colt. 826, is consistent with them all, and affords a very good illustration of the principle upon which they are founded. The judgment upon the demurrer to the first plea in that case proceeded upon the earlier part of the 68th section of the 8 & 9 Vict. c. 18, which enacts, that, “if any party *shall be entitled* to any compensation in respect to any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works,” such party may have the same settled by the verdict of a jury, &c. The court held, in accordance with what had been laid down in a great many cases,—whether rightly or not, I do not stop to inquire,—that the fact of the party being entitled to compensation is a condition; or, in other words, that the verdict of the sheriff’s jury, and the judgment thereon,

do not estop the company from denying that the lands or the claimants' interests therein were damaged or injuriously affected by the execution of the works. You may traverse the *damnum* as well as the *injuria*. As to the second plea in that case, that the plaintiff was not entitled to compensation in respect of the damage and injury to an amount exceeding 50*l.*, the court held that to be a bad plea. Looking at the language of the 68th section, it will be seen that the judgment upon the one plea is quite consistent with the judgment on the other, because the language of that section is, that, *"*if the compensation claimed in such case shall exceed the [750 sum of 50*l.*, &c. The condition is, that more than 50*l.* shall be claimed, not that the party shall prove that he is entitled to more. I think Mr. Field has failed to show that the Court of Exchequer in that case had not their attention drawn to the point, and did not intend to decide in accordance with the authorities which have been adverted to. Upon the other point, I do not think it necessary to add anything to what my Lord has said.*

KEATING, J., was in the Divorce Court.

Judgment accordingly.

CHURCH v. WRIGHT. Jan. 29.

A., assuming to be the owner of land over which eight other persons claimed rights of common, enclosed it. In order to assert their claim, the eight signed a document professing to authorize *each other*, and B. and C. *as agents for all and each of them*, to enter upon the land and remove the fences, which B. & C. accordingly did. Separate actions having been brought against the eight for this trespass,—each was allowed to plead several pleas justifying under the titles of the other seven, as well as under his own title.

THIS was an action of trespass. The declaration stated that a certain close, being part of a piece or parcel of land formerly called and known as Old Oak Common, was in the possession of one Edward Ranson as tenant to the plaintiff, the reversion thereof then belonging to the plaintiff; and that, whilst the said close was so in the possession of the plaintiff's tenant as aforesaid, the defendant injured the plaintiff's said reversion therein, by wrongfully breaking down and removing a portion of the fences thereof: and the plaintiff claimed 10*l.*: And the plaintiff also claimed a writ of injunction to restrain the defendant from a *repetition of the said grievances and the committal of grievances of a like kind relating to the said [751 close.

The alleged trespass was committed by certain persons named Thomas Burgundy and Philip Mason under the following circumstances:—The plaintiff, who claimed to be the owner of the soil of certain land formerly known by the name of Old Oak Common, in the parish of Acton, in the county of Middlesex, upon which several persons claimed to have rights of common, in April, 1860, refused all cattle found thereon to be driven off, and had since impounded all cattle straying there, and in 1862, enclosed the whole, and let the land to various tenants. With the view of asserting their supposed right of common, the defendant and seven other persons signed and gave to

Burgundy and Mason the following authority, under which those two persons entered upon the locus in quo on the 5th of November last, and broke down a portion of the fence thereof:—

"We, Robert Tubbs, George Wood, Simon Wright, James Heath, Charles Brett, William Veale, Henry Fame, and James Stevens, being persons entitled to and claiming rights of common of pasture in, over, and upon Old Oak Common, in the parish of Acton, in the county of Middlesex, do and each and every of us hereby doth authorize and empower each and every of us, and we and each and every of us further authorize and empower Thomas Burgundy and Philip Mason for and on behalf and in the names and name of all and each and every of us, to throw down and remove all fences, mounds, and other obstructions erected, standing, or being upon Old Oak Common aforesaid, which are a nuisance to or in any way interfere with or prejudice the rights of common of pasture in, upon, or over the same. Witness our hands," &c.

*752] *The plaintiff thereupon brought actions against all the persons by whom the trespass was authorized: and on the 13th instant an order was made by Byles, J., "that all the actions be stayed but one, till verdict and further order; the plaintiff to elect which action he will try: defendants undertaking not to plead judgment and recovery in bar of other actions against co-trespassers, provided plaintiff take only nominal damages." This order was, however, abandoned; and a summons was taken out for leave to plead several pleas to each action, according to the following abstract:—"1. Goldsmiths' Company seised in fee of lands in respect whereof common of pasture over locus in quo enjoyed from time immemorial: defendant occupier of lands, and justifying removal of fences wrongfully erected and obstructing right of common. 2. Goldsmiths' Company seised in fee; grant of common of pasture by person unknown seised in fee of locus in quo to person unknown seised in fee of lands of Goldsmith's Company; stating occupation of lands by defendant, and justifying removal of fences as in first plea. 3. George Wood seised in fee of lands in respect whereof common of pasture over locus in quo enjoyed from time immemorial; justifying removal of fences by authority of Wood. 4. George Wood seised in fee of lands; stating similar grants to that in second plea, and justifying under Wood. 5. Robert Tubbs seised in fee of lands; similar right of common to that in third plea, and justifying under Tubbs. 6. Robert Tubbs seised in fee of lands; stating similar grant to that in second plea, and justifying under Tubbs. 7. Robert Tubbs seised in fee; stating similar right of common to that in third plea; James Heath occupier, and justifying under Heath. 8. Robert Tubbs seised in fee; similar grant to that in second plea; Heath occupier, and justifying under Heath. *9. Charles Brett seised in fee; similar right to that in third plea, and justifying under Brett. 10. Charles Brett seised in fee; similar grant to that in second plea, and justifying under Brett. 11. Charles Brett seised in fee; similar right to that in third plea; William Veale occupier, and justifying under Veale. 12. Charles Brett seised in fee; similar grant to that in second plea; Veale occupier, and justifying under Veale. 13. Charles Brett seised in fee; similar right to that in third plea; Henry Tame occupier,

and justifying under Tame. 14. Charles Brett seised in fee; similar grant to that in second plea; Tame occupier, and justifying under Tame. 15. The Royal Society seised in fee; similar right to that in third plea; James Stevens occupier, and justifying under Stevens. 16. The Royal Society seised in fee; similar grant to that in second plea; Stevens occupier, and justifying under Stevens."

Montague Smith, Q. C., on a former day,—the above pleas having been disallowed at Chambers,—obtained a rule nisi for leave to plead them. He submitted, that, each of the eight defendants having authorized the others in writing to commit the alleged trespass, there could be no valid objection to each of them justifying under the title of all. And he referred to *Davies v. Williams*, 16 Q. B. 546 (E. C. L. R. vol. 71), where sixteen pleas were pleaded without objection justifying the trespasses complained of under as many different titles.

Manisty, Q. C., and *Kemplay*, now showed cause.—If these eight defendants had each brought an action for an interference with his right of common, each must have relied upon his own title, and could have derived no aid from the right or title of the other seven. Why should their position in this respect be *altered because they are defendants instead of plaintiffs? In *Davies v. Williams*, [*754 all the parties were made defendants, and each justified in his own right. This, however, is a totally different case. Eight persons give authority to a ninth to commit a trespass. Each authorizes the agent to commit the trespass for him, not for the other seven. One could not delegate a right to commit a trespass for the others.

Montague Smith, Q. C., and *Coxon*, in support of the rule, were stopped by the court.

PER CURIAM. We think the proposed pleas are within the authority, and should be allowed. Rule absolute.

CAWTHRON v. TRICKETT. Jan. 11.

By a bill of lading the vessel was to be unloaded in regular turn:—Held, that the *consignor* was liable for her detention beyond her regular turn, although there was no express contract for demurrage in the bill of lading.

Held also, that, where the master was part-owner, but had the entire control and management of the ship, paying to his co-owner a third of the net profits, it was competent to him to sue in his own name.

THIS was an action by the master and part-owner of the ship *Providence* against the consignor of a cargo of stone, to recover damages for her improper detention.

The first count of the declaration was upon the contract contained in the bill of lading, by which the stone was made deliverable "to John S. Ancomb, mason, Maidstone, the vessel to take her regular turn in unloading, he or they paying freight for the said stone, as customary, at the rate of 13s. per ton, as per accustomed measurement," and alleged for breach that the *goods were not received and taken and unloaded from the said ship by the said John S. [*755 Ancomb, or by any other person, within a reasonable time, whereby the ship was detained, &c.

There was also a common count for demurrage.

The defendant traversed the several allegations in the first count, and to the second pleaded never indebted, upon which issue was joined.

The cause was tried before the Secondary of London in August last. It appeared that the plaintiff was master and owner of a third share of the Providence, another person being owner of the other two thirds; and that, by arrangement between the plaintiff and his co-owner, the plaintiff worked the vessel, paying all outgoings (except repairs), and handing over to his co-owner one-third of the net profits. It further appeared, that, on the arrival of the vessel at Maidstone on the 8th of May, in consequence of some misunderstanding between the defendant and the consignee, the latter declined to receive the stone; and on the 13th the plaintiff's attorney wrote to the defendant informing him that 2*l.* per day demurrage would be claimed from that day. The discharge of the cargo commenced on the 18th, and was finished on the 20th.

On the part of the defendant, it was submitted that there was no contract for demurrage in the bill of lading, and that it was not competent to the master to sue without joining his co-owner.

The Secondary directed the jury to find for the plaintiff for 14*l.*, being for seven days' detention, at 2*l.* per day.

Shaw, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection. He referred to *Brouncker v. Scott*, 4 Taunt. 1, and *Evans v. Forster*, 1 B. & Ad. 118 (E. C. *756] L. R. vol. 20), to show that the master cannot maintain an action against the consignee of the cargo on an implied contract to pay demurrage. [ERLE, C. J., observed that this was an action against the *consignor*.]

David Keane now showed cause.—The cases of *Brouncker v. Scott* and *Evans v. Forster* merely decide that the master cannot sue the *consignee* unless there be something in the bill of lading to make him liable. In *Shields v. Davis*, 6 Taunt. 65 (E. C. L. R. vol. 1), it was held that the master has a special property in the vessel, and may declare for the freight of goods as carried in *his* vessel, though he be not owner. The arrangement between the plaintiff and his co-owner here was such as clothed the former with an interest to enable him to make the contract declared on and found by the jury. It was clearly part of the contract that the vessel should be unloaded in her regular turn. In *Story on Agency*, § 393, it is said, that, "where the agent has made a contract in the subject-matter of which he has a special interest or property, whether he professed at the time to be acting for himself or not," he "acquires personal rights, and may maintain an action upon the contract in his own name, without any distinction, whether his principal is or is not entitled also to similar rights and remedies on the same contract." [WILLES, J.—This is more like the case of one tenant in common letting his part for years or at will to his companion: see *Bac. Abr. Joint Tenants* (I) 2.] This plaintiff may be said to fall within the definition of *Exercitor navis*, in the Digest (referred to in *Story* § 36), Lib. 14, tit. 1, l. 1, § 15,—"*Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is Dominus navis sit, sive a Domino navem per aver-*

sionem conduxit, vel ad tempus, vel in perpetuum." This point was taken in *Chappel v. Comfort* (a) at nisi prius, but not reserved by Byles, J. (b) [*757]

Shaw, in support of the rule.—The stipulation in the bill of lading, that the vessel is to take her regular turn in unloading, is nothing more than a mere direction as to the mode in which she is to discharge. And, assuming that it implies a contract to unload within a reasonable time, it is a contract with the owner, and not one in respect of which the master can maintain an action: and the private arrangement between him and his co-owner cannot affect the power to sue upon such a contract. If there had been a demise of the ship to Cawthron, the case might have been different. As it stands, there is nothing to take the case out of the ordinary rule. There is no instance to be found of a master having maintained an action upon a contract implied from the bill of lading, for detention of the ship. *Brouncker v. Scott* and *Evans v. Forster* are distinct authorities to show that this sort of action could not be maintained against the consignee; and the reasoning of Sir J. Mansfield in the former of those cases is equally applicable where the consignor is the defendant. *Domett v. Beckford*, 5 B. & Ad. 521 (E. C. L. R. vol. 27), was also referred to.

ERLE, C. J.—I am of opinion that this rule should be discharged. This is an action by Cawthron, who is both master and a part-owner of the ship *Providence*, against the defendant, who was the consignor of certain goods under a bill of lading. Now, it is clear that the master may sue the consignor upon any contract that is contained in the bill of lading: and it seems to me that there is in the bill of lading in question that which amounts to a contract on the consignor's part that the ship shall take her regular turn in unloading. The action is for the detention of the vessel for an unreasonable time; and there was evidence that the detention would not have happened if the vessel had taken her regular turn for unloading. It seems to me, therefore, that this is an action upon a contract contained in the bill of lading. There is a confusion of ideas in saying, that, because the consignee is not liable upon an implied contract, therefore this action against the consignor cannot be maintained. Where the contract is to be inferred from the words of the document, and not merely to be gathered from the evidence, it seems to me that that is an express contract. The contract declared on here, is, that the defendant engages with the plaintiff that the vessel shall be unloaded in her regular turn: and the evidence is, that, without any default on the part of the plaintiff, she was not allowed to take her regular turn in unloading. The contract therefore was broken.

WILLIAMS, J.—I am of the same opinion. In substance, the damages which the plaintiff has recovered are fairly attributable to a breach of the contract contained in the bill of lading.

WILLES, J.—I am of the same opinion. The rule was moved upon the notion that two cases,—*Brouncker v. Scott* and *Evans v. Forster*,—governed it. To these I may add *Stindt v. Roberts*, 5 D. & L. 460. The rule relied on there was, that, upon an implied contract, the

(a) Reported on another point, 10 C. B. N. S. 802 (E. C. L. R. vol. 100).

(b) The count for demurrage was not insisted upon.

owners must sue, not the master. Those cases, however, were actions against the consignees for delay in taking out the goods. They are wholly inapplicable to a case like this, of an action by the master
 *759] against the consignor for the breach of a contract contained in the bill of lading. The bill of lading amounts to a contract to take the cargo from the captain in the ship's regular turn. It is clear, therefore, that this is an action upon a contract made with the plaintiff.

KEATING, J., concurred.

Rule discharged.

THE SUB-MARINE TELEGRAPH COMPANY v. DICKSON and Another. Jan. 20.

The declaration stated that the plaintiffs were possessed of a telegraphic-cable for the transmission of messages between Dover and Calais by means of electricity, part of which cable was by charter of the *Crows* lying at the bottom of the sea within three marine miles of the shore: that the defendants were possessed of a certain ship on the high seas, and so carelessly navigated the same that their anchor fouled and injured the cable.

Plea, that the telegraphic-cable was lying in the high seas more than three marine miles from the shore, and out of and beyond the realm, dominion, sovereignty, and jurisdiction of the Queen; that the defendants were Swedes, and the vessel a Swedish vessel; that, in the usual and ordinary course of navigation, she was proceeding on a voyage from Spain to a port in Sweden, and in the usual and ordinary course of navigation cast anchor; that, without any default of the defendants, the anchor dragged, and in being raised became entangled with and injured the telegraphic-cable; that there was no buoy or mark to show the spot in which the telegraphic-cable was lying, and that its position and existence were wholly unknown to the defendants and those having the management and direction of the vessel and anchor.

Second replication, that the defendants could and ought to have known, and had the means of knowing, and but for their negligence and want of ordinary care would have known, the position and existence of the telegraphic-cable, and that it was through the carelessness, negligence, and want of ordinary or any care that they did not and would not know or use the means of knowing of its position and existence; that the anchor was not cast, got up, dragged, or entangled in the due course of navigation, as alleged, but contrary to the due course of navigation; and that the defendants, by their mariners and servants, with such means of knowledge, and with a culpable and unlawful omission to use the said means of knowledge, and out of and contrary to the due course of navigation, by and through the carelessness, mismanagement, and culpable want of knowledge of the defendants and their mariners and servants, committed the grievances in the declaration mentioned.

Third replication,—as to so much of the plea as alleged the grievances complained of to have been committed out of the realm, dominion, sovereignty, and jurisdiction of the Queen,—that one end of the said telegraphic-cable was fastened to the soil of the county of Kent, and that the said grievances were committed within three miles of the shore, and not more than three miles from the shore, as in the plea alleged.

New-assignment (as to part of the plea), that the plaintiffs sued, not only for causes of action in the plea admitted, but also for causes of action committed within three miles of the shore; and also for that, after the servants and mariners of the defendants were informed and had express notice of and knew the position and existence of the telegraphic-cable, and were warned and cautioned that they would injure the same, the defendants, through the carelessness and negligence of themselves and their mariners and servants in that behalf, and contrary to their duty in that behalf, so negligently and improperly, and without using due or ordinary or any care, and with more force and violence than was necessary, disentangled the anchor and cable of the defendants from the telegraphic-cable with such carelessness and negligence that by means thereof the same was injured as in the declaration mentioned:—

Held, on demurrer,—that the declaration was good, by reason of the imputation of negligence; that the plea was good, as an argumentative traverse of the negligence charged in the declaration; that the second replication was a good traverse of the plea; that the third replication was bad, inasmuch as it traversed an immaterial allegation in the plea; and that the new-assignment was good.

THE first count of the declaration stated, that the plaintiffs, before

and at the time of the committing of the grievance by the defendants as thereafter next *mentioned, were lawfully possessed of a [*760 certain telegraphic cable used by the plaintiffs for the purpose of transmitting messages between Dover, in the County of Kent, in England, and Calais, in the kingdom of France, by means of electricity, part whereof was then lawfully, and by and with the consent and license of Her Majesty the Queen, and under and by virtue of a certain charter and grant made by Her said Majesty the Queen in that behalf, lying and being in the high seas, near to, that is to say, within three marine miles of, the sea-shore and coast of Kent aforesaid; and the defendants were also then possessed of a certain ship or vessel called The Gustaff Adolphe, and of the tackle, apparel, and furniture thereof, on the high seas aforesaid, and then had the care, direction, and management of the same; yet that the defendants, not regarding their duty in that behalf, whilst the said telegraphic cable of the plaintiffs was so lawfully lying and being in the said high seas as aforesaid, took so little and such bad care of their said ship or vessel, and in the direction and management of the same, that a cable and an anchor attached thereto, then being part of the said tackle, apparel, and furniture of the said ship or vessel, by and through the carelessness, misdirection, and mismanagement of the defendants and their mariners and servants in that behalf, then with great force and violence were dragged against, ran foul of, struck against, and caught hold of the said part of the said telegraphic cable of the plaintiffs, and dragged, injured, and broke the same; and, by reason of the premises, the plaintiffs had been *forced and obliged to pay, [*761 lay out, and expend, and had necessarily paid, laid out, and expended, a large sum of money, to wit, the sum of 2000*l.*, in and about the repairing the said damage so done to the said telegraphic cable as aforesaid; and also by means of the premises the plaintiffs lost and were deprived of their said telegraphic cable for a long space of time, to wit, for the space of eighty-one days, and thereby lost and were deprived of all the profits and advantages which during that time they might and otherwise would have derived and acquired by the use of their said telegraphic cable, by the sending of messages and otherwise.

The second count was similar to the first, alleging the cable to have been "within *eight* marine miles of and more than *three* marine miles from the sea-shore."

The defendants pleaded,—first, to the whole declaration, not guilty. Secondly, plea to the first count, not possessed.

Thirdly, to the said first count, that the said part of the said cable in that behalf mentioned was not lawfully, by and with the consent and license of Her Majesty the Queen, and under and by virtue of the said alleged charter and grant, lying and being in the high seas, as alleged.

Fourthly, to the first count, that the said part of the said telegraphic cable alleged to have been dragged, injured, &c., was not within three marine miles of the coast of Kent, as alleged.

Fifthly, to the first count, that, at the said time when, &c., the said part of the said telegraphic cable alleged to have been dragged, injured, &c., was lying and being in the high seas, to wit, at the bottom

of the sea, more than three marine miles from the sea-shore of England, out of and beyond the realm, *dominion, sovereignty, and *762] jurisdiction of our Lady the Queen; and the said vessel of the defendants was then also more than three marine miles from the said sea-shore, and out of and beyond the said realm, dominion, sovereignty, and jurisdiction respectively; and the defendants then, and at the time of the commencement of this suit were, and still are, aliens domiciled in parts beyond the seas, to wit, at Gothenburg, in the said kingdom of Sweden, and subject to the laws of the said kingdom of Sweden, and not to the laws of England; and that the said ship or vessel, with her appurtenances, was and still is a Swedish and not a British vessel: That, in the usual and ordinary course of navigation, the said ship or vessel, before and at and after the said time when, &c., was proceeding on a voyage from Alicante, in the kingdom of Spain, to Gothenburg aforesaid, in the said kingdom of Sweden; and that, in the usual and ordinary course of navigation upon such voyage, the said ship had occasion to and did cast anchor, and afterwards had occasion to and did get up her anchor and proceed on her voyage; that, without any default of the defendants, the said anchor, after it had been cast as aforesaid, in consequence of the effect of the wind and waves upon the said vessel, dragged and became entangled with the said part of the telegraphic cable, and that, on getting up the said anchor, and in order to save the same, it became necessary to disentangle it from the said part of the said telegraphic cable; and that, for the purpose and in the act of disentangling the said anchor from the said part of the said telegraphic cable, the said part of the said telegraphic cable was necessarily a little dragged and injured, which was the said alleged breach in the first count mentioned: And that, before and at the said time when, &c., there was no buoy or mark of any kind to show or point *763] out the *spot in which the said part of the said telegraphic cable was lying; and that, before and when the said telegraphic cable so became entangled with the said anchor as aforesaid, the said telegraphic cable was at the bottom of the sea, and incapable of being seen by, and that the place and position and existence thereof were wholly unknown to, the defendants and their servants having the management, direction, and control of the said vessel and anchor.

The defendants demurred to the first count, the ground of demurrer alleged in the margin being that "the first count discloses no breach of duty, the defendants not being shown to have had any knowledge of the existence or position of the part of the telegraphic cable alleged to have been injured." Joinder.

Seventh plea, to the second count, not possessed.

The eighth and ninth pleas (to the second count), were similar to the third and fifth pleas respectively.

The defendants also demurred to the second count, the ground of demurrer stated in the margin being, "that it appears by the second count that the court has no jurisdiction over the alleged cause of action, and that the defendants are not shown to have had any knowledge or means of knowledge of the existence or position of the part of the telegraphic cable alleged to have been injured." Joinder.

Second replication to the fifth plea, that before and at the time when the said ship so cast anchor and so got up her anchor and proceeded

on her voyage, and so dragged her anchor, and when the said telegraphic cable so became entangled with the said anchor, as in the fifth plea mentioned, the defendants and their said mariners and servants could and ought to have known, and had the means of knowing, and but for their negligence and want of ordinary care in that behalf could and would have known, the place, position, and *existence of the said part of the said telegraphic cable in the first count [*764 mentioned, and it was through the carelessness, negligence, and want of ordinary or any care of the defendants and their said mariners and servants in that behalf that they did not and would not know or use the means of knowing of the place, position, and existence of the said part of the said telegraphic cable; that the said anchor was not cast, got up, dragged, or entangled, in the due course of navigation, as in the fifth plea alleged, but contrary to the due course of navigation; and that the defendants, by their said mariners and servants, with such means of knowledge, and with a careless and culpable and unlawful omission to use the said means of knowledge, and out of and contrary to the due course of navigation, by and through the carelessness, misdirection, and mismanagement, and culpable want of knowledge of the defendants and their said mariners and servants in that behalf, committed the grievances in the first count mentioned, as in the first count alleged.

Third replication to so much of the fifth plea as alleged the grievances complained of to have been committed out of the realm, dominion, sovereignty, and jurisdiction of our Lady the Queen, that one end of the said part of the said telegraphic cable was fastened to the soil of the said county of Kent, and, by virtue of the said license, grant, and charter of our said Lady the Queen, the said part of the said telegraphic cable, being so fastened as aforesaid, was carried thence across the sea-shore of the said county unto and into the sea abutting thereon; and that the said part of the said telegraphic cable in the first count mentioned was within three marine miles of the sea-shore and coast of the said county of Kent, and of the said county; and that the said grievances were committed within such three miles, as in the first *count alleged, and not more than three miles from the sea- [*765 shore of England, as in the fifth plea alleged.

New-assignment, as to so much of the fifth plea as averred, that, for the purpose and in the act of disentangling the said anchor from the said part of the said telegraphic cable, the said part of the said telegraphic cable was necessarily a little dragged and injured, and that the same was the alleged breach in the first count mentioned,—that the plaintiffs sued, not only for causes of action in the fifth plea admitted, but also for causes of action committed within three marine miles of the sea-coast and county of Kent, and within the realm, dominion, sovereignty, and jurisdiction of our Lady the Queen, and whilst the said ship, cable, and anchor of the defendants were within such three miles, and within such realm, dominion, sovereignty, and jurisdiction of our Lady the Queen; and for that, after the servants and mariners of the defendants were informed and had express notice of and well knew the position and existence of the said part of the said telegraphic cable within such three marine miles, and were warned and cautioned that they would injure the same, the defendants by

and through the carelessness, negligence, misdirection, and mismanagement of the defendants and their said mariners and servants in that behalf, and contrary to their duty in that behalf, so negligently and improperly, and without using due or ordinary or any care in that behalf, and with more force and violence than was necessary or proper in that behalf, disentangled the said anchor and cable of the defendants from the said part of the said telegraphic cable as in the first count mentioned, with such carelessness, negligence, and mismanagement, and such great and unnecessary and improper force and violence, that by means thereof the said telegraphic cable, by and *766] through the said carelessness, *misdirection, and mismanagement of the defendants and their mariners and servants in that behalf, was dragged, injured, and broken, as in the first count mentioned.

The plaintiffs demurred to "so much of the fifth plea as puts in issue the realm, dominion, sovereignty, and jurisdiction of our Lady the Queen in and over the said high seas, and alleges that the defendants were aliens domiciled in and subject to the laws of Sweden, and not to the laws of England, and that the ship was a foreign ship on a foreign voyage, and puts in issue the defendants' liability to answer in this court in respect of the grievances in the first count mentioned,"—the ground of demurrer stated in the margin being, "that the defendants, though aliens, on the high seas, are liable to answer in this court for the grievances of which the plaintiffs have complained." Joinder.

There was also a demurrer to the residue of the fifth plea, the ground stated in the margin being, "that the defendants do not show that their want of knowledge was not a culpable negligence, or that they were not guilty of negligence towards the plaintiffs, in the manner of casting and getting up their anchor." Joinder.

There were similar replications, new-assignment, and demurrers to the ninth plea.

The defendants demurred to the second replication and new-assignment to the fifth and ninth pleas respectively, on the ground of departure; and to the third replication to each of those pleas respectively, on the ground that they were "insufficient to establish any breach of duty on the part of the defendants." Joinders.

The defendants also pleaded not guilty to the new-assignments; on which the plaintiffs took issue.

*767] **R. Clark*, for the plaintiffs.(a)—The declaration does not charge the defendants with doing or omitting to do any act

(a) The points marked for argument on the part of the plaintiffs were as follows:—

As to the declaration,—"1. As to both counts,—that the circumstances sufficiently show that the plaintiffs were possessed of the property injured, that the property was lawfully at the bottom of the sea, and that the defendants injured the same through their negligence; that the way in which the injury was caused is also stated so as sufficiently to show that it forms the ground for an action on the case, all which is admitted by the demurrer; and that it was not necessary for the plaintiffs to state any other facts:

"2. That the facts stated show sufficiently a cause of action which this court has jurisdiction to try; and, if the defendants have any ground for objections to the jurisdiction of the court, the same should be shown by plea."

As to the fifth and ninth pleas,—"1. That, although the defendants be Swedes, yet, as they have appeared in this court as defendants in the action, they must answer for the damages done, according to the laws of the realm, unless they can show by plea, some law of the foreign country by which they are excused, and that the cause of action arose within the foreign jurisdiction:

with express reference to the telegraphic cable; but it charges them with negligently navigating their vessel on the high seas, so as to injure property *of the plaintiffs which was lawfully there. In *Wyatt v. Harrison*, 3 B. & Ad. 871 (E. C. L. R. vol. 23), the [*768 declaration stated that A. was lawfully possessed of a dwelling-house adjoining to a dwelling-house of B., and that B. dug the soil and foundation of the last-mentioned house so negligently, *and so near to the plaintiff's house*, that the wall of the latter house gave way: the defendant pleaded to the negligence, and, as to so much of the count as related to the defendant's digging into the soil and foundation of the defendant's dwelling-house so near to the dwelling-house of the plaintiff that by reason thereof the wall of the plaintiff's house gave way, the defendant demurred: and the demurrer was held good. Negligence, therefore, is the gist of the action. *Dodd v. Holme*, 1 Ad. & E. 493 (E. C. L. R. vol. 28), 3 N. & M. 739, is to the same effect. [WILLIAMS, J.—That case is somewhat qualified by *Trower v. Chadwick*, 3 N. C. 334, 3 Scott 699, in error, *Chadwick v. Trower*, 6 N. C. 1, 8 Scott 1.] That case has been much misunderstood: it was not a case of negligence at all. Knowledge or no knowledge is a matter which goes to the jury as to the damages; but it cannot decide the question of negligence: *The Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol. 53). That was an action for improperly navigating a vessel, so as to ground her upon the plaintiffs' oyster-beds. It being contended in argument that the declaration should have averred that the defendant knew that the *oyster-beds were there, Lord Denman observed: "Suppose [*769 the parties did not know that the oysters were there, but managed their vessel negligently. If a man drove furiously round a corner, and injured a person on the further side, would it be necessary for that party in a declaration to allege that the defendant knew of his being there? Would not an averment of negligence include all that was necessary to maintain the action?" And, in delivering judgment, his Lordship says: "The declaration charges want of proper skill and care, and no more, in each count. Indeed there is an allegation of knowledge, but not so distinctly pointed at the existence of the oyster-beds in the part in question, and their liability to be injured, as to make the defendant's conduct wilful: nor does the declaration in direct terms charge a wilful injury. The first count complains of unskilful and careless navigating, conducting, and

"2. That the defendants' knowledge or want of knowledge of the position or existence of the cable, is only one ingredient in the question of negligence, to be submitted with all the other facts to the jury; and it is consistent with these pleas that their want of knowledge arose from negligence, and was in itself part of the negligence complained of, and part of the cause of the damage, which is not denied by these pleas."

As to the replications and new-assignments,—"1. That the second replication to the fifth and ninth pleas, as well as the new-assignments, support the declaration, and are not a departure; that the fifth and ninth pleas only contain an argumentative denial of the negligence complained of, by pleading, amongst other things, the defendants' and their servants' want of knowledge; and the replications show that such want of knowledge is no excuse, but was in fact part of the negligence complained of:

"2. That the fifth and ninth pleas aver, that, in disentangling the anchor from the cable, the cable was dragged and injured, and that the same is the breach complained of; and the new-assignments support the counts, by alleging that the same was negligently done, &c., by the defendants and their servants."

placing of the vessel in and upon the said part of the river. The defendant in his fifth plea alleges that the said part was a public highway *at all times* and seasons, and, substantially, that he navigated, conducted, and placed her there in the exercise of his right as a liege subject to use the highway; averring also, that this is the navigating, &c., complained of in the declaration. This is, in truth, a denial, argumentatively, of doing the acts at unseasonable times of the tide, which may have been objectionable on demurrer, but is good after verdict." So, here, the pleas are a mere argumentative mode of denying the negligence charged. His Lordship proceeds,—“The sixth plea merely alleges that the oysters and oyster-brood were so placed, and in such masses, as unlawfully to diminish the depth of water, and greatly obstruct the navigation, to the common nuisance of the Queen's subjects; but it does not go on to allege that the vessel *770] could not with due care and skill have passed up the river, or grounded without doing the injury complained of.” [WILLES, J.—There are two subsequent cases which are precisely in point, viz., *Dimes v. Petley*, 15 Q. B. 276 (E. C. L. R. vol. 69), and *Bateman v. Bluck*, 18 Q. B. 870 (E. C. L. R. vol. 83).] In *Butterfield v. Forrester*, 11 East 60, and *Davies v. Mann*, 10 M. & W. 546, it was held that one who by his own negligence is contributory to the injury, is without remedy. All these cases show that notice or knowledge is immaterial, and that the only question is, whether or not there has been actionable negligence on the part of the defendant. The demurrer to the declaration therefore fails. Then the fifth plea alleges that the cable was lying at the bottom of the sea, and out of the jurisdiction of Her Majesty. [*Archibald*, for the defendants, intimated that he did not mean to contend that the act done by the defendants was out of the jurisdiction of the court.] That being so, all that the plea amounts to, is, that the defendants were proceeding in the due and ordinary course of navigation, that the defendants were guilty of no default, and that the existence of the cable was unknown to them. But their very want of knowledge amounts to negligence. In effect, the plea merely sets up certain circumstances which would be for the consideration of the jury upon the plea of not guilty. The same remarks apply to the ninth plea. The second replication alleges that the defendants ought to have known and had the means of knowing the existence and position of the cable, and that the injury complained of was the result of their negligence and culpable want of knowledge. That clearly is no departure: it sustains and confirms the declaration. Neither is the new-assignment a departure: it would be a very singular new-assignment if it was. In *Lynch v. Nurdin*, 1 Q. B. 29, 38 (E. C. L. R. vol. 41), Lord Denman says: “Between wilful mischief *771] and gross negligence the boundary-line is hard to trace: I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice. It is then a matter strictly within the province of a jury deciding on the circumstances of each case.”

*772] *Archibald* (with whom was *Lush*, Q. C.), contra. (a)—“Neither count of the declaration discloses a cause of action: no legal

(a) The points marked for argument on the part of the defendants were as follows:—

“1. That neither of the counts in the declaration discloses any sufficient cause of action:

“2. That, the defendants having no notice or knowledge of the existence or position of the

duty is shown of which the defendants have committed a breach. To cast anchor wherever it may be found necessary or convenient, is a right which belongs to all persons, whether subjects of Her Majesty or foreigners, who navigate the sea. That right is not to be subject to such a use of the sea by individuals as is here attempted to be established. A declaration which charges a breach of duty must contain an allegation from which the duty can be inferred, otherwise the declaration is bad: *Metcalf v. Hetherington*, 11 Exch. 257. To make this declaration good, it should at least have averred that the defendants had notice of the existence and position of the cable, and might in the ordinary course of navigation have avoided it: and, in the absence of those allegations, the averment of negligence goes for nothing. Many authorities to that effect are referred to in the case list mentioned. In *Southote v. Stanley*, 1 Hurlst. & N. 247, the declaration alleged that the defendant was possessed of an hotel, into which he had invited the plaintiff to come as a visitor, and in which there was a glass-door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant, and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened; nevertheless, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition and *unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff. It was held that the declaration disclosed no cause of action against the defendant. In *Dutton v. Powles*, 2 Best & Smith 174, 191 (E. C. L. R. vol. 110), 31 Law J., Q. B. 191, the defendant, a merchant at Liverpool, chartered a ship from the plaintiffs at a lump sum, and put it up as a general ship. The shippers of goods in the vessel, according to the custom of

telegraphic cable in question, no legal duty towards the plaintiffs is shown in either of the counts to navigate the ship of the defendants or to manage their anchor and tackle with reference to such telegraphic cable, or so as to avoid dragging against or injuring the same; and that, in the absence of any allegation of wilful damage, no sufficient cause of action appears; that it is consistent with both counts that the ship of the defendants, with her anchor and tackle, may have been directed, managed, and navigated in strict accordance with the ordinary rules of the sea and practice of navigation; and that no negligence or breach of duty in that respect is shown in either count."

As to the second count,—"1. That the part of the telegraphic cable in question having been more than three marine miles from the shore, it was not lawfully lying in the sea; and that the defendants were not therefore bound to take notice of its position or existence, and were under no duty to manage their ship, with her anchor and tackle, otherwise than according to the ordinary rules of the sea and practice of navigation; and that no breach of such rules or practice is shown:

"2. That the alleged grievance as described is not one in respect of which any rule either of the common or maritime law gives any right to recover damages:

"3. That, as the part of the telegraphic cable injured was lying in the sea at the distance of more than three marine miles from the coast, the case is not one over which this court under the circumstances has jurisdiction." [This was abandoned.]

As to the replications to the fifth and ninth pleas respectively,—"That they do not show any duty, or actionable negligence or breach of duty, on the part of the defendants; or, if otherwise, that they are respectively bad on the ground of departure."

And, as to the new-assignments,—"that they do not show any excess in disentangling the anchor, and are bad on the ground of departure."

Liverpool, made out and delivered to the defendant for the captain copies of the respective bills of lading, which were eight in number. It was necessary, as the defendant knew, that a document called a consular manifest should be made out at Liverpool before the ship sailed, containing an accurate account of the goods on board the ship, and that for that purpose the person employed to make it out should have all the bills of lading, or copies of them, before him. On application for the copies by the plaintiff, the defendant delivered over only six out of the eight copies as the whole number. An imperfect consular manifest was drawn up from these, and the plaintiffs were in consequence subjected to fines and expenses at the end of the voyage. It was held, that, in the absence of express contract or mercantile usage, there was no legal duty making it incumbent on the defendant to deliver over the copies to the plaintiffs, and therefore that no action could be maintained against him for the omission. Erle, C. J., delivering the judgment of the Exchequer Chamber, said: "The allegation that the defendant negligently, improperly, and carelessly handed over to the plaintiffs' agent copies of six out of the eight bills of lading as and for the whole, does not allege a cause of action, *774] unless it expresses a breach of a duty. If there was a duty in the defendant to take care to deliver up all the copies, then the negligence alleged was a breach of that duty. But I can find nothing to show that there was any such duty; consequently, there was no breach of duty in the defendant in not delivering up the copies of all the bills of lading." That is the principle which has uniformly been laid down since the case of *Brown v. Mallet*, 5 C. B. 599. The allegation of negligence, in the absence of some duty, amounts to nothing: see the judgment of Erle, C. J., in *Cox v. Burbidge*, 13 C. B. N. S. 430 (E. C. L. R. vol. 106).^(a) [WILLIAMS, J.—Your argument amounts to no more than this, that the declaration must disclose a cause of action.] In the case of *The Saxonia*, 1 Lushington's Adm. R. 410, it was held that the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, ss. 296, 297, 298, do not apply to a foreign ship navigating the Solent between the Isle of Wight and Hampshire, and within three miles of the British coast; and that, if a collision there happens between a British and a foreign ship, the conduct of each ship is to be tried by the law maritime. "That being established," said Dr. Lushington, "there are two rules affecting sailing vessels of all countries, which, in our opinion, decide this case. The first of these rules is, that a vessel which has the wind free is bound to give way to a vessel close-hauled, and that a steamship is to be treated as a vessel which has the wind free. This was the case of *The Saxonia*: she was therefore bound to give way to the *Eclipse*, and the *Eclipse* had a full right to expect her to do this, and was not bound in any respect to alter her course. But the second rule, which we consider affects this case, is that though the closehauled vessel is not bound to give way, she is nevertheless bound *775] to show some proper and sufficient light in sufficient time to, to enable the steamship or other vessel, whose duty it is to give way to avoid any collision. *No blame can attach to a vessel for running foul of another vessel, if it has been impossible to distinguish it until the collision was inevitable.* A vessel at anchor, or a fishing-boat, is bound

(a) And see *Hammock v. White*, 11 C. B. N. S. 588 (E. C. L. R. vol. 103).

by the general rules of the sea to exhibit a light, so as to afford to the vessels whose duty it is to avoid, the means of doing so." That is precisely applicable here. [WILLES, J.—You know the cruel consequences which that has led to. A foreigner sued here for a collision at sea is liable for the full amount of the damage sustained; whereas, a British owner would only be liable to the extent of the value of his own vessel: *The Wild Ranger*, 32 Law J., Adm. 59.(a)] These telegraphic cables may be laid in a spot where it is essential that vessels should anchor. Are mariners to be restricted in the exercise of their ordinary rights of anchorage, without some notice? The hardship will be great upon our own shipping: but, in the case of foreigners, who are not cognisant of or bound by our municipal regulations, it would be intolerable. Is not a duty imposed upon the company to take care that their cable does no injury? Suppose the defendants had lost their anchor in consequence of the company's negligence in laying their cable in an improper place, or in omitting to buoy it, would not the former have had a good cause of action against them? In *White v. Crisp*, 10 Exch. 312, it is held, that, where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it. *All that *The Mayor of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol 53), decides, is, that, [*776 although the oyster-bed might have been a nuisance, yet it was not competent to the defendant to abate that nuisance, if he sustained no further damage from it than any other of the Queen's subjects. If there had been a demurrer to that declaration, it would probably have been held bad for want of an averment of notice. In *Harmond v. Pearson*, 1 Campb. 515, Lord Ellenborough says,—“It is a peremptory law of navigation, that, when any substance is sunk in a navigable river, so as to create danger, a buoy shall be placed over it, for the safety of the public. This is the proper and specific notice, which all understand and are bound to attend to. A verbal communication may easily be misunderstood, and is very likely (as in the present case) to lead to confusion and mischief. But it is of the utmost importance to the property and the lives of His Majesty's subjects that such a warning should be given as will necessarily inform every one engaged in the navigation of the river, of the existence of the danger.”(b) Assuming the declaration to be good, the fifth and ninth pleas, it is submitted, afford good answers to it. The third replication is clearly bad, for selecting a part of the plea which is immaterial. [ERLE, C. J.—I think the declaration is good. I also think the pleas are good. The second replication and the new-assignment substantially traverse the pleas.]

ERLE, C. J.—I am of opinion that the declaration in this case is good. It complains of an injury done to the property of the plaintiffs, an electric telegraphic cable, by the defendants, in the course of navigation, through the carelessness, negligence, and mis-

(a) See *Nelson v. Couch*, *antè*, p. 99.

(b) See *Hancock v. The York, Newcastle, and Berwick Railway Company*, 10 C. B. 348 (E. C. L. R. vol. 70).

*777] management *of the mariners and servants of the defendants. I will assume, for the purpose of this judgment, that the bottom of the sea may be used for lawful purposes. The question has arisen in respect of oyster-beds and sunken vessels: and we may take it, inasmuch as there are acts of parliament on the subject, that the placing of telegraphic cables at the bottom of the sea is a known mode of using that part of the earth's surface. The plaintiffs' property, therefore, was lawfully placed where it was. The defendants also had an undoubted right to navigate the high sea, and, if need be, to let go their anchor wherever the safety or convenience of their ship required it to be done. These two rights happen to conflict. Upon the face of the declaration, therefore, it appears that the property of the plaintiffs was damaged by an anchor of the defendants dropped in a place where they had a right to drop it. Then comes the replication, which admits the defendants' right to anchor, provided that right be exercised with due care and skill, in the ordinary course of navigation, but alleges that what was done was done negligently and contrary to the due course of navigation. The whole essence of the case thus turns upon the word negligent. It is conceded that the court has jurisdiction over the matter. If what the defendants did was done wilfully, no doubt they would be responsible. Omitting all about the jurisdiction of the court, and the defendants being aliens, and the vessel a foreign vessel, the defendants by their pleas allege, that, in the usual and ordinary course of navigation, they had occasion to cast anchor, that, in raising it, it became entangled with the telegraphic cable and unavoidably dragged and injured it, that there was no mark or buoy to indicate the position of the cable, which was incapable of being seen, and that they were unaware *778] of its existence. The answer to that in the replication *is, that the damage arose from the defendants' negligence and want of care in navigating their ship, and from their culpable want of knowledge, in omitting the means of knowledge at their command. In the ordinary case of a highway, if damage is occasioned to an individual through the negligent use of it, the party so negligently using it is responsible. The plea appears to me also to be good. It is in effect a traverse of the negligence charged, and is what is already put in issue under not guilty. This discussion, however, will be valuable, inasmuch as it will tend to bring more precisely before the jury the real question which they will have to try. Negligence is a word of very undefined signification: and the attempt to draw the line between it and wilful acts has always been a source of great confusion. The substance of the plea is, that the defendants were lawfully navigating their vessel on the high seas, and in the ordinary course of navigation let down their anchor, and in getting it up, it having without any default of the defendants become entangled with the telegraphic cable, of the position and existence of which they were unapprised, the damage complained of ensued. If that be so, I do not think it can be said that a foreigner is bound before he casts anchor on the high seas, to inquire whether there is a telegraphic cable at the bottom which may be injured by the exercise of his natural right. The replication and new-assignment in effect traverse the plea, and say that the acts done by the defendants were not done

in the due and ordinary course of navigation, or with ordinary care and skill, and that, if they had no knowledge of the existence and position of the telegraphic cable, they had the means of knowledge, and were guilty of negligence in not availing themselves of such means of knowledge. If this takes away the force of the plea, the declaration, which is *good, stands. As to the argument, that the defendants would have had a right of action if their vessel had been damaged in consequence of the telegraphic cable being laid down without anything to indicate its position, it seems to me that that would raise precisely the same question. It comes at last to a question of negligence. [*779]

WILLIAMS, J.—I am of the same opinion. The declaration is good by reason of the imputation of negligence; and the plea is good as an argumentative traverse of that negligence. There is more difficulty about the replication and new-assignment: but, upon the whole, I am willing to treat them as my Lord has done.

WILLES, J.—I am of the same opinion. Mr. Archibald admits that there is nothing in the allegation as to the three miles. The rights and duties of persons navigating vessels apply equally whether in port or on the high seas. It is the duty of the persons navigating so to exercise their rights as to do no damage to the property of others. I see no substantial difference between a telegraphic cable and another ship,—except that the position of the cable may or may not be known, and it may or may not have been the duty of the master of the vessel to know that it was there. The more or less difficulty of the case can only be taken into consideration by a jury. I cannot imagine that a man would be justified in wilfully or negligently injuring an anchor even when improperly dropped in a fairway, if he knew it was there. No one is justified in wilfully or by culpable negligence injuring property of another, whether above or under water. In the case of *The Batavier*, 10 Jurist 19, where one vessel came into collision with another, which was lying at *anchor, Dr. Lushington says: “The presumption of law, where a vessel at anchor is run down by another, I take to be this,—that the vessel running down the other must show that the accident did not arise from any fault or negligence on her own part; and for this reason, that the vessel at anchor has no means of shifting her position, or avoiding the collision; and it is the duty of every vessel, seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if it be practicable and consistent with her own safety, any collision. This is the doctrine, not merely of maritime law, but of common sense: it is the doctrine which prevails on roads; where, supposing a carriage to be standing still on the wrong side, it is no justification for another running against it, though the latter (?) be on the right side.” I think the declaration in this case is good: and for the same reason I think the fifth and ninth pleas are good. The second replication and the new-assignment are also good, inasmuch as they substantially traverse the allegations in the pleas. The third replication is bad, because it selects a portion of the plea which is not material; and on that there must be judgment for the defendants. Upon all the rest the judgment will be for the plaintiffs. Judgment accordingly. [*780]

*781]

*SICHEL v. LAMBERT. Jan. 11.

In order to sustain a plea of coverture, the defendant swore, that, in 1844, she was married to one J. L. at a Roman catholic chapel in London (both parties being Roman catholics); that the ceremony was performed by a priest, in the way in which Roman catholic marriages are ordinarily solemnized; that she cohabited with J. L. for several years, and until he went to Australia, where he now resided:—

Held, that the court and jury might presume that the marriage was valid, though it was not proved either by oral testimony or by the certificate given by the priest on the occasion, that the place where the marriage was solemnized was licensed under the 6 & 7 W. 4, c. 85, s. 18, or that the registrar was present,—the contrary not appearing.

THIS was an action for goods sold and delivered. Plea, amongst others, coverture.

The cause was tried before Keating, J., at the sittings at Guildhall after last Trinity Term. In order to sustain her plea of coverture, the defendant stated that she was married to John Lambert in 1844, at a Roman catholic chapel in George Street, Portman Square; that she and Lambert were both Roman catholics; that they were married by a priest in the way in which Roman catholic marriages are ordinarily solemnized; that they lived together for some years; that her husband was in Australia; and that she had received a letter from him a few weeks before the commencement of the action. She also produced a certificate of the marriage from the priest by whom the ceremony was performed; and a certificate showing that the civil contract of marriage had been performed before the French consul. There was no proof, however, that the person who performed the ceremony of marriage was a priest, or that the chapel was a place licensed for the celebration of marriages, or that the registrar was present at the time.

On the part of the plaintiff it was submitted that the evidence was not sufficient to establish the coverture, inasmuch as it was not shown that the ceremony took place in a registered place of worship. The learned judge, however, overruled the objection, and directed a verdict to be entered for the defendant upon that issue, reserving the plaintiff leave to move.

Marshall Griffiths, in Michaelmas Term last, accordingly obtained a rule nisi to enter the verdict for the plaintiff upon the issue on the plea of coverture.

*782] *Beasley* now showed cause.—Parol evidence of a marriage, followed by cohabitation, has always been considered to be sufficient to sustain a plea of coverture: *Hopewell v. De Pinna*, 2 Campb. 113; *Catterall v. Catterall*, 1 Rob. E. R. 304; *Campbell v. Corley*, 28 Law T. 109. [WILLIAMS, J.—The sole question here is, whether there was evidence from which the jury might infer that the place where the ceremony was performed was registered.] The marriage (the parties being innocent) will be valid, although the place be not registered. By the 18th section of the 6 & 7 W. 4, c. 85, any certified place of religious worship may be registered for the solemnization of marriages therein. Section 20 requires the marriage in such registered place to be performed in the presence of the registrar. This, however, it is submitted, is directory only: there are no words making the marriage void for non-compliance therewith. The 35th section enacts that every marriage solemnized under that act shall be

good and cognisable in like manner as marriages before the passing of the act according to the rites of the church of England. The 39th section enacts that "every person who after the 1st of March, 1837, shall knowingly and wilfully solemnize any marriage in England, except by special license, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the church of England, or than the *registered building* or office specified in the notice and certificate as aforesaid, *shall be guilty of felony* (except in the case of a marriage between two of the society of friends, commonly called quakers, according to the usages of the said society, or between two persons professing the jewish religion, according to the usages of the jews); and every person who in any such registered building or office shall knowingly and wilfully solemnize any marriage *in the absence of* *a registrar of the district in which such registered building or office is situated, *shall be* [*783 *guilty of felony,*" &c. And the 42d section enacts, that, "if any person shall *knowingly* and *wilfully* intermarry after the said 1st. of March, under the provisions of this act, in any place other than the church, chapel, registered building, or office, or other place specified in the notice and certificate as aforesaid," &c., "or in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this act, the marriage of such persons, except in any case hereinafter excepted, (a) shall be null and void." In the absence of evidence to the contrary, the court will assume that all was rightly done. [WILLES, J.—In *The Queen v. Manwaring*, 1 Dears. & Bell, C. C. 182, upon an indictment for bigamy, it appeared that the first marriage took place in a dissenting chapel duly licensed for marriages, and a witness was called who proved that he was present at the marriage, that it took place in the dissenting chapel in the presence of the registrar, that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties afterwards lived together as man and wife for some years. It was held,—first, that the parol testimony of the witness sufficiently proved the fact of marriage,—secondly, that there was *primâ facie* evidence that the chapel was duly registered and was a place in which marriages might legally be solemnized. Wightman, J., there says: "The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, of which a copy was produced at the trial, seemed to me at the time to be circumstances which afforded, and I now *think, aided as they are by the presumption *omnia rite esse* acta, they do afford, *primâ facie* evidence that the chapel was [*784 a duly-registered place, in which marriages might be legally celebrated. *If it were not such a place, all those who took part in the proceedings would be criminally liable for doing so.*" It is true the registrar there was proved to have been present: but that was not necessary to the reasoning of my Brother Wightman. WILLIAMS, J.—The statute requires the chapel to be registered as a place for the solemnization of marriages, and that the registrar shall be present. Can we, in the absence of all proof, presume that these two requisites were duly complied with? WILLES, J.—In *Piers v. Tuite*, 1 Drury

(a) Of marriages solemnized according to the provisions of the 4 G. 4, c. 76.

& Walsh 279, 299,(a) Lord Plunket, C., dealing with a marriage which took place at Douglas, Isle of Man, says: "According to the doctrine laid down by the ecclesiastical judges, and which doctrine is recognised by the common law of the land, it lies upon the party impeaching the marriage, after that a marriage *de facto* has been established, to prove that it is null and void as a marriage: this has not been attempted by the defendants, and consequently, on the principle '*semper præsuntitur pro matrimonio*,' I must presume that the forms required by the act (b) were complied with, and pronounce the marriage in question to have been a legal and valid one."]

Garth, in support of the rule.—No doubt, long cohabitation affords *785] presumptive evidence of a marriage: but, where the party who relies upon the fact of marriage goes on and shows where and how the ceremony *took place, he must show that all the legal requisites of a valid marriage were complied with. The act of parliament requires not only that the building shall be registered, but that the registrar shall be present: there was no proof that either of these conditions to the validity of the marriage was complied with. [WILLES, J.—In *The King v. The Inhabitants of Brampton*, 10 East 282, two British subjects at St. Domingo, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country (French) was read by a person habited like a priest, and interpreted into English by the officiating clerk,—which service the parties understood to be the marriage-service of the church of England; and they received a certificate of the marriage, which was afterwards lost: and this was held to be sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of St. Domingo,—particularly after eleven years' cohabitation as man and wife, till the period of the husband's death. That was a settlement case, a case therefore where strict proof was required. Lord Ellenborough puts it on the ground of cohabitation as man and wife for a period of eleven years, preceded by a ceremony which might have been, and which the parties understood and intended at the time to be, the ceremony of marriage.] His lordship seems mainly to rely on the fact of the ceremony having been performed in a *proper place*,—a fact as to which there is no evidence whatever in this case. [WILLES, J.—The judgment of Grose, J., is more general. "The parties," he says, "meant to be married; they went openly to a chapel in the country where they were; they found there a person appearing as a priest of the country, and they were married by him; the service was performed in French, but it was *786] translated to the parties, *and they understood it to be the marriage-ceremony. From these facts the presumption would be, that it was a marriage according to the law of that country, by a priest of that country, cognisant of its laws in that respect, and who it must be presumed would celebrate it according to the law of his own country. There is therefore a fair and reasonable presumption that these parties were regularly and legally married according to the law of St. Domingo. I should think the marriage might be sus-

(a) And see *Piers*, app., *Piers*, resp., 2 House of Lords Cases 331.

(b) A statute of the Isle of Man, of the 27th of May, 1757, intituled "An act to prevent clandestine marriages."

tained according to the law of England; but I have no doubt that it is sustainable by the law of the country where it was celebrated." This is a very strong case.] The place and all the surrounding circumstances there raised a strong presumption that what was done was done legally. But here there was no evidence that the person whose presence was the most essential part of the ceremonial was in attendance. The building was not shown to be registered: and, if so, it would be no part of the duty of the registrar to be there. There is no reason why any presumption should be made in favour of a person who traded as a feme sole, and who merely sets up this unrighteous defence in order to escape a righteous claim.

ERLE, C. J.—I am of opinion that this rule should be discharged. The question for consideration is, whether there was evidence presented to the jury upon the trial which warranted them in coming to the conclusion that the defendant was a married woman. She swore that she was married to John Lambert in 1844, at a Roman catholic chapel in London, both being of that persuasion; that the ceremony was performed by a priest in the way in which Roman catholic marriages are ordinarily solemnized; that they cohabited for several years, and were still on terms, though the husband was in Australia; and that a *certain document which she produced was the [*787 certificate given to her by the priest on that occasion. There was no proof, either upon the face of the certificate or otherwise, that the place where the alleged marriage took place was a place licensed for the celebration of marriages under the statute 6 & 7 W. 4, c. 85, or that the registrar was present. The question is, whether we can presume that all things requisite to the validity of the marriage were done, from the fact that the witness knew the place to be the usual place and the form to be the proper form for Roman catholic marriages. I think we should presume that. Mere cohabitation and reputation are sufficient to prove a marriage, provided nothing to the contrary appears, in the case of persons not being dissenters: and I do not see why the same principle should not govern all marriages. Take the case of what was requisite, under Lord Hardwicke's Act, 26 G. 2, c. 33, to the validity of a marriage,—license or banns: the rule was, to presume a valid marriage from long cohabitation. I do not see why since the 6 & 7 W. 4, c. 85, the same presumption should not be made as before. I think there is strong ground for presuming here that the chapel was licensed and the registrar present, because the statute contains an enactment, s. 39, declaring that any person who should knowingly and wilfully solemnize any marriage in any other place than a registered building, or in the absence of the registrar, should be guilty of felony. It seems to me that the ordinary rule *omnia præsuntur rite esse acta* ought to prevail in this case. I think there was abundant evidence to show that this was a valid marriage.

WILLIAMS, J.—I am of the same opinion. I look at this case as raising the question whether, where a marriage has been solemnized by a person and in a *place which appear to be duly authorized, the presumption that all has been rightly done does arise, [*788 until the contrary appears. I think there was ample evidence here to satisfy the jury that the parties were duly married.

the trial of a plaint for a trespass committed by breaking the doors of certain rooms in a cottage of the plaintiff, the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed: the defendant's case was, that the plaintiff had let him the whole of the cottage; and the Court of Exchequer held that title to a corporeal hereditament was in dispute, within the 58th section of the 9 & 10 Vict. c. 95, and that the county court had no jurisdiction over the plaint.

Beasley, in support of his rule.—The test as to whether or not the title to land comes in question, is, the result of the trial. It is plain from the record, that the only cause of action which the plaintiffs could have here might have been tried in the county court. If so, the authorities are clear that the plaintiffs are not entitled to costs.

ERLE, C. J.—I am of opinion that the rule in this case should be made absolute. The plaintiffs brought their action for the breaking and entering of their dwelling-house, and the conversion, &c., of their goods, and also for an assault on the female plaintiff. The defendant pleads several pleas denying the title of the husband, and justifying the assault on the wife. There is a new-assignment that the assault was in excess of the alleged right of the defendant: and upon this latter, viz., for the excess, the jury give the plaintiffs a verdict for 40s., all the rest being found for the defendant. The plaintiffs having thus recovered only 40s., the case is *prima facie* within the jurisdiction of the county court, and the plaintiffs would not be entitled to *793] costs unless the judge who presided at the trial *gave one of the certificates mentioned in the 13 & 14 Vict. c. 61, s. 12. The learned judge has certified that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in the county court, inasmuch as the title to land came in question. Looking at this record, it appears to me that that certificate is not in accordance with the result and the findings of the jury. The plaintiffs bring their action for three causes,—a trespass to their premises, conversion of their goods, and an assault on the wife. It is only in respect of the excess in the latter that the plaintiffs obtain a verdict for 40s. The plaintiffs' true cause of action therefore was for the excess in the assault upon the wife: and for that the action clearly might have been brought in the county court. The plaintiffs claim costs on the ground that, taking the whole of the record together, the title to land appears to have come in question. But I take the rule to be this, that, where there are two causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are for the purposes of costs to be treated as being as distinct as if there had been two separate actions. I think the plaintiffs are to be in no better position by joining the whole in one action than they would have been in if they had brought two.

WILLIAMS, J.—I am of the same opinion. If the plaintiff had succeeded in establishing his title to the premises, the order of my Brother Byles would have been properly made. But, as he failed, I agree with my Lord that he cannot better his title to costs because in an action which might have been tried in the county court he has joined an unfounded claim of title to land.

WILLES, J.—I am of the same opinion. When the *legisla-
 ture speaks of a cause of action in these acts, it means a cause [*794
 of action in respect of which the plaintiff is entitled to costs, viz., in
 which he has recovered a sum exceeding 20*l.* in an action of contract,
 and 5*l.* in an action of tort. Here the plaintiffs have recovered 40*s.*
 only for the excess in the assault upon the wife. The good sense of
 the thing is consistent with the language of the statute.

KEATING, J.—I am of the same opinion. The only cause of action
 which the plaintiffs had was the excessive and inexcusable assault on
 the wife. That was not less *the* cause of action, because the plaintiffs
 have thought fit to add an unfounded claim for damages in respect
 of something else.

WILLES, J.—There was a case of *Smith v. Harnor*, 3 C. B. N. S.
 829 (E. C. L. R. vol. 91), which is precisely in point. There A. sued
 B. for an assault, with a count for slander, and obtained a verdict on
 the first count for 5*l.*, but failed to establish a cause of action in
 respect of the second count; and it was held that the plaintiff was
 entitled to no costs. My Brother Williams there says,—“This is not
 the less an action of trespass, in which the plaintiff has failed to obtain
 damages exceeding 5*l.*, because an unfounded charge of slander is
 attached to it.”
 Rule absolute.

*COLE v. MEEK. Jan. 14.

[*795]

By a charter-party the charterer bound himself to load at Havana “a full and complete cargo
 of sugar and other lawful produce.” Certain goods were enumerated, including timber, and
 certain rates of freight were mentioned; and the charter-party proceeded, “other goods, if any
 should be shipped, to pay in proportion to the foregoing rates, *except what might be shipped for
 broken stowage, which should pay as customary*” (half freight). A full cargo of mahogany logs
 was shipped, but no broken stowage was supplied to fill up the interstices, and the vessel was
 in consequence obliged to retain thirty tons of ballast:—Held, that, it being impossible to ship
 a “full and complete cargo,” without broken stowage, the charterer was bound by his contract
 to furnish it.

THIS was an action brought by the plaintiff, a shipowner at Bristol,
 to recover a balance of freight and demurrage due upon a charter-
 party, and also damages for not having shipped a full and complete
 cargo.

The first count of the declaration stated that the plaintiff and the
 defendant agreed by charter-party that the plaintiff's ship, called the
Ina, then in Liverpool, being staunch, strong, and in every respect
 fitted for the voyage, should immediately be made ready in any dock
 the defendant might name in the river Mersey, and there load a full
 and complete cargo of coals and other lawful merchandise, the vessel
 being guaranteed to carry at least 375 tons of dead weight, if
 required; and, being so loaded and despatched, should immediately
 proceed to Havana, and discharge the same agreeably to bills of
 lading, after which she should again be made ready, and there, and
 [or] at one other usual loading place in the island as ordered; lead
 from the agents of the defendant a full and complete cargo of sugar
 and other lawful produce, which the defendant thereby bound himself
 to ship, not exceeding what the vessel could reasonably stow and

carry over and above her cabin tackle, provisions, and furniture, and, being so loaded, should therewith proceed to Cowes for orders (unless ordered direct on signing bills of lading) to discharge at a safe port in the United Kingdom, or on the continent between Cronstadt and Havre, both inclusive, or in the Mediterranean or Bosphorus; and, being arrived at the port as ordered, should there deliver the said cargo to the defendant or his agents according to bills of lading: And *796] the defendant thereby agreed to pay *freight for the round voyage as follows, viz., if ordered from Cowes for a port in the United Kingdom, or a port on the continent, not in the Baltic, 80s. (if sent direct to the United Kingdom, 2s. 6d. per ton less); for a port in the Baltic, 85s.; for a port in the Mediterranean or Bosphorus, 95s.,—for sugar and molasses per ton of 2240 lbs. net, Spanish weight, delivered: the same rates to be paid for rum per liquid ton, and per load for timber: other goods, if any should be shipped, to pay in proportion to the foregoing rates, *except what might be shipped for broken stowage, which should pay as customary*: the whole in full of all pilotages, port-charges, &c., any exemption from which through the cargo to be for charterer's benefit: If the vessel should be sent direct from the loading port to the Mediterranean (calling at Gibraltar for orders, if required), the freight to be the minimum rate above stated: If timber should be shipped, the quantity of sabcu not to exceed sixty loads, to be taken through the vessel's hatchway: Payment to become due and be made on arrival at the final port of discharge and true delivery of the cargo, by good and approved bills on London at three months' date, or cash equal thereto: 250l. to be advanced on sailing from Liverpool, less insurance, by charterer's acceptance at four months' date: Cash for ship's disbursements in Cuba to be supplied in Cuba to extent of 250l., if required, on usual terms, and at par of exchange: All advances to be deducted on final settlement: Thirty-five working days to be allowed for loading the cargo there, to be computed from the time of the vessel being and remaining in a proper loading place ready to load, and to cease on being despatched, and waiting orders at port of call: Notice of readiness and arrival to be given in all cases by the owner or master in writing: Time occupied in changing ports not to count as laying *797] days: And the *plaintiff and the defendant thereby further agreed that the defendant might detain the vessel any further period beyond the said laying days, paying demurrage at the rate of 4l. sterling per working day (certain perils excepted); the outward cargo to be laden in turn, and discharged at the rate of twenty-five tons per working day after vessel should be in a usual berth as ordered by the defendant's agents: Averment, that the plaintiff had performed the said charter-party in all things on his part, and that before the action was brought all things had happened, all times had elapsed, and all conditions had been fulfilled necessary to entitle the plaintiff to a performance by the defendant of the said charter-party, and to sue him for the breaches thereof thereafter mentioned: Yet that the defendant broke the said charter-party, in this, that he did not nor would pay the freight made payable by the said charter-party, as provided by the said charter-party, but therein wholly made default, and the same remained in arrear and unpaid, contrary

to and in violation of the terms of the said charter-party: and the defendant further broke the said charter-party, in this, that he did not nor would load at Havana and [or] at any other loading place in the island a full and complete cargo of sugar and [or] other lawful produce, but loaded a short and incomplete cargo, by reason whereof the plaintiff lost the freight he would otherwise have earned if a full and complete cargo had been loaded pursuant to the terms of the said charter-party: and the defendant further broke the said charter-party, in this, that he did not nor would ship at Havana and [or] any other loading place in the island a reasonable and proper cargo, or one within the true intent and meaning of the said charter-party, but, on the contrary, loaded a cargo of timber of unreasonable and improper dimensions and sizes for the said ship, without *providing [*798 broken stowage for the same, although broken stowage was necessary for the due and proper shipment of such cargo; by reason whereof the said ship was unable to carry so large a cargo as she would otherwise have done, as according to the terms and intent of the said charter-party she ought to have done; and the plaintiff was thereby prevented from earning so large an amount of freight as he would otherwise have done.

There were also counts for freight, demurrage, hire of a ship, work and labour, interest, and money found due on accounts stated.

The defendant pleaded,—first, to the second and third breaches assigned in the first count, that he did not break the charter-party as therein alleged,—secondly, to the declaration other than the first count, except as to 145*l*. parcel of the money claimed, never indebted,—thirdly, as to so much of the declaration as the second plea was pleaded to, that before action he satisfied and discharged the plaintiff's claim by payment,—fourthly, as to so much of the declaration as the second plea was pleaded to, a set-off,—fifthly, as to 145*l*. parcel of the money claimed, and as to the breach of contract in the first count of the declaration firstly assigned, identity of causes of action, and payment of that sum into court.

The plaintiff joined issue on the first, second, third, and fourth pleas, and, as to the fifth plea, replied that the sum of 145*l*. was not enough to satisfy the plaintiff's claim in respect of the matters to which the said fifth plea was pleaded. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—The *Ina* sailed from Liverpool on the 12th of August, 1861, and arrived at Havana on the 10th of October, and *discharged her cargo, and was reported ready to receive her [*799 return cargo on the 31st. The shipment of the return cargo was completed by the 1st of January, 1862.(a) The cargo so put on board, which was in one sense a full and complete cargo, consisted of logs of mahogany and some cedar. The captain repeatedly applied for but could not obtain wood for broken stowage, and in consequence he was compelled to keep on board thirty tons of ballast, to trim the ship. In respect of these thirty tons, the plaintiff on the ship's arrival in London claimed freight at the accustomed rate, viz. half the stipulated rate, amounting to 55*l*. 5*s*.

(a) The question of delay, and amount of demurrage, was referred

On the part of the defendant, witnesses were called who stated that broken stowage was always matter of express stipulation. On the other hand, witnesses were called who stated that a full and complete cargo of mahogany could not be shipped without broken stowage: none of these, however, appeared ever to have shipped timber from Havana; nor was there any evidence that broken stowage could be obtained there.

It was insisted for the plaintiff, that under the terms of this charter-party, if broken stowage was necessary to put on board "a full and complete cargo," the charterer was bound to provide it.

For the defendant, it was submitted that the construction of the document was for the judge, and that, in the absence of express stipulation, the charterer was not bound to provide broken stowage.

His Lordship left it to the jury to say whether or not the defendant had shipped a full and complete cargo, within the charter-party. They found that he had not, and accordingly returned a verdict for the plaintiff for the amount claimed.

*800] *Karslake*, Q. C. (with whom was *F. M. White*), now moved to enter a verdict for the defendant, or for a new trial, on the grounds of misdirection and that the verdict was against the weight of evidence.—The plaintiff's claim in respect of broken stowage is founded upon these words of the charter-party, "other goods, if any should be shipped, to pay in proportion to the foregoing rates, *except what should be shipped for broken stowage, which should pay as customary.*" This, it is submitted, does not amount to a contract to ship broken stowage: and there was no evidence to show that under such a charter-party as this the charterer binds himself to provide broken stowage. [ERLE, C. J.—I thought it was rather a question for the jury than for me. There was evidence that it was usual to put on board with such a cargo as this a certain quantity of broken stowage.] There was also evidence that this was always matter of express stipulation. The charterer contracts to put on board a full and complete cargo of lawful produce, amongst other things timber and he has complied with his contract by putting on board as much timber as the ship could contain. In *Moorsom v. Page*, 4 Campb 103, by a charter-party the freighter covenanted to provide for the ship a full and complete cargo consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid: and it was held, that, having supplied the vessel with as large a quantity of tallow and hides as the master chose to take on board, the charterer was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done. "The parties," said Lord Ellenborough, "very likely intended that copper should necessarily form a part of the cargo; but they have not said so." So, in *Irving v. Clegg*, 4 M. & Scott 572 (E. C. 14 *801] R. vol. 30), 1 N. C. 53, the defendants hired a ship for a voyage to the East Indies and back, the freight for the homeward cargo to be 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; the fore cabin to be filled with light goods, and 100 tons of rice or sugar to be shipped previous to any

other part of the loading, *to ballast the vessel, and keep her in proper trim for the voyage.* The defendants, in pursuance of the charter-party, shipped 100 tons of rice, and completed the cargo with light goods, in consequence of which the master was compelled to ship a large quantity of stone ballast, to enable the ship to sail safely; and it was held, that the defendants were at liberty, after shipping the 100 tons of rice, to complete the cargo with such goods as they thought fit, and were not bound to pay freight for the tonnage occupied by the additional ballast. These cases, it is submitted, are precisely in point, if the construction of the charter-party is a question for the court.

ERLE, C. J.—If this was a question for the jury, it was submitted to them, and I cannot say that I was dissatisfied with the verdict. If it be a question for the court, I think the plaintiff's claim is well founded. By the terms of the charter-party, the charterer undertakes to load at Havana "a full and complete cargo of sugar and other lawful produce." Certain goods are enumerated, including timber, and certain rates of freight are mentioned; and the charter-party goes on, "other goods, if any should be shipped, to pay in proportion to the foregoing rates, *except what might be shipped for broken stowage, which should pay as customary,*"—that is, half freight. The charter-party is for "a full and complete cargo." The charterer has the option to put on board any merchandise he *pleases: but he is bound to fill the ship. If he chooses to put a cargo on board which [*802 will leave a portion of the ship which cannot be filled without broken stowage, he is bound to put on board broken stowage. The shipowner is under an obligation to receive broken stowage at half the stipulated rate of freight: and I think there is a correlative contract on the part of the charterer to put on board so much broken stowage as will complete the full loading of the ship.

WILLIAMS, J.—I am of the same opinion, and for the same reasons.

WILLES, J.—I am of the same opinion. The refusal of this rule will not conflict with the ruling of Lord Ellenborough in the case of *Moorsom v. Page*. There, the vessel was filled with tallow, plus the quantity of ballast to make the vessel seaworthy with a full cargo of tallow. The contention on the part of the shipowner was, that the charterer ought to have supplied copper, so that some of the ballast might have been taken out, and thus a larger amount of freight would have been earned. But Lord Ellenborough ruled, that, as the charterer had the option of shipping a full cargo consisting of copper, tallow, and hides, or other goods, and had put on board a full cargo of tallow, the mere fact, that, if he had loaded her in some other way, the owner would have earned a greater freight, was not to be taken into consideration. That is not applicable here. The thirty tons of ballast, plus the timber, did not fill the ship, but left a space which might and ought to have been filled up with broken stowage. That which the shipowner was bound to receive, the charterer was bound to load. The obligations on either side are correlative.

KEATING, J., concurred.

Rule refused.

FORCE v. WARREN. Jan. 15.

1. A., suspecting B. of stealing meat from his shop, accused her of having done so (no one being by at the time). B. thereupon applied to a police-magistrate for a summons against A. A. meeting a third person, who was in his shop at the time the supposed larceny was committed, told him that proceedings had been taken against him, and said to him,—“You were in the shop: did not you see her take it?” Held, a privileged communication.

2. A. having accused B. of stealing meat, a friend of the latter, to whom she had mentioned the fact, called at A.’s shop, and asked him if he had accused B. of stealing; to which A. answered,—“Yes; and I believe it to be true:”—Held, not a privileged communication.

THIS was an action for slanderous words imputing larceny to the plaintiff. The defendant pleaded not guilty and a justification.

The cause was tried before Keating, J., at the sittings at Westminster after last term; when the following facts appeared in evidence:—The plaintiff had gone to the shop of the defendant, a butcher, for the purpose of buying a piece of meat. On her passing *807] the shop in the course of the same day, the defendant called her in, and, no person being present, accused her of stealing meat, telling her she was too light-fingered, and cautioning her not to do it again. The plaintiff thereupon went to the police-court for a summons. Upon receiving notice of this, and meeting one Herring, the defendant said to him,—“They have taken proceedings against me: you were in the shop; she stole a piece or two of meat; did not you see her take it?” Another witness, to whom the plaintiff had communicated the fact of the defendant having accused her of stealing, and who lodged in the same house with the plaintiff, proved that she went to the defendant’s shop, and asked him whether he accused Margaret (meaning the plaintiff) of stealing a piece of meat; whereupon he answered, “Yes; and I believe it to be true.”

On the part of the defendant, it was submitted that the communication in each instance was privileged. The learned judge ruled otherwise; and the jury returned a verdict for the plaintiff with 10*l*. damages.

Joyce now moved for a rule nisi to enter a verdict for the defendant, pursuant to leave reserved. He submitted, that, as to the statement made to Herring, the communication was clearly privileged as well on the ground of private interest as of public duty, inasmuch as proceedings had been taken or threatened, in which Herring might have been a witness for the defendant. And, as to the statement made to the other witness, he submitted that the defendant was not a mere volunteer, but made it *bonâ fide* in answer to an inquiry set in motion by the plaintiff herself; that the circumstances under which that statement was made utterly negatived all notion of malice; and that *808] the defendant was interested in protecting himself against the effect of an admission which might have been used as evidence on the proceedings before the magistrate.

ERLE, C. J.—I am of opinion that there should be no rule in this case. No action, of course, would lie against the defendant for the words spoken to the plaintiff, no person being by: and, as to the words spoken to Herring, I agree with Mr. Joyce that the communication was privileged. Proceedings had been taken or threatened against the defendant: he had therefore an interest in making inquiry

of a supposed eye-witness in order to protect himself, and also a public duty to substantiate a criminal charge. But, as to the words spoken to the other witness, I cannot see that there was any privilege. The defendant was not acting in pursuance of either interest or duty in repeating the charge to her. It is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent questions. And I see no interest that the defendant could have to justify himself in the eyes of that witness. Ordinary prudence should have induced him to decline to have any conversation with her upon the matter. I do not think the defendant was excusable in regard to this upon either of the grounds upon which the doctrine of privileged communication rests.(a)

The rest of the court concurring,

Rule refused.

(a) See *Whiteley v. Adams*, antè, p. 392, and *Fryer v. Kinnersley*, antè, p. 422.

Communications, in performance of official duty, *Mayor v. Sample*, 18 Iowa (1865) 306, or by a past to a present employer, as to the character of a clerk, *Fowle v. Bowen*, 3 Tiff. (N. Y. 1864) 24, or to a subscriber at a merchandise agency in reference to the standing and credit of plaintiff, *Ormsby* 133. *v. Douglass*, 10 Tiff. (N. Y. 1868) 447, or a charge of theft, *Brown v. Hathaway*, 13 Allen (Mass. 1866) 239, *Nott v. Stoddard*, 38 Vt. (1865) 25, are privileged. Not, however, an accusation against a public candidate: *Aldrich v. Press Pr. Co.*, 9 Minn. (1864) 133.

*CHRISTOPHERSON v. LOTINGA. Jan. 21. [*809

An application for a discovery of documents under the 50th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), must be made upon the affidavit of *the party to the cause*. *Herschfeld v. Clarke*, 11 Exch. 712, confirmed.

AN application was made to Willes, J., at Chambers, on the part of the plaintiff, for a discovery of documents in the possession or power of the defendant, under the 50th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.(a) The application was founded upon an affidavit by the managing clerk of the plaintiff's attorney, it being sworn that the plaintiff was in Spain, where he resided and carried on business. The learned judge, conceiving that the language of the statute was directory only in this respect, made the order.

Kemplay, on a former day in this term, obtained a rule nisi to rescind the order of Willes, J., on the ground that the learned judge had no power to *dispense with the affidavit which the [*810

(a) Which enacts, that "upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party † of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named by such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds) to the production of such as are in his or their possession or power: and upon such affidavit being made, the court or judge may make such further order thereon as shall be just."

† See *Barnett v. Hooper*, 1 Fost. & Fin. 412, 467.

statute in express terms requires, viz. that of the party himself. He referred to *Herschfeld v. Clarke*, 11 Exch. 712, where the Court of Exchequer held that the application for a discovery under this section must be made upon the affidavit of the party himself.

Sir G. Honyman now showed cause.—The case of *Herschfeld v. Clarke*, upon which this rule was obtained, was before the learned judge at Chambers. [WILLES, J.—I rather encouraged the application to the court, conceiving it better to have the point settled.] The matter was not very much considered in that case: Blackburn in effect obtained all he wanted, under s. 51. It is submitted that the object which the legislature had in view when framing the 50th section will be amply attained by holding the provision as to the affidavit to be directory; and this will best accord with the ordinary rule for the construction of statutes. In the notes to *Collins v. Blantern*, in 1 *Smith's Leading Cases*, 5th edit. p. 337, it is said: "A question sometimes arises, whether, when a statute points out a particular mode for the performance of some acts therein commanded, its enactments shall be taken to be *imperative*, or only *directory*; in the former only of which cases an act done in a different mode from that pointed out by the statute would be void. In *Pearce v. Morrice*, 2 Ad. & E. 84, 96 (E. C. L. R. vol. 29), 4 N. & M. 48, the following rule for distinguishing between imperative and merely directory enactments is given by Taunton, J.,—'A clause is *directory* where the provisions contain mere matter of direction, and no more; but not so when they are followed by words of positive prohibition.' See *The King v. The Mayor, &c., of Gravesend*, 3 B. & Ad. 240 (E. C. L. R. vol. 23); *The King v. The Inhabitants of St. Gregory, Canterbury*, 2 Ad. & E. 99, 106, 4 N. & M. 137; *Brooks v. *Cock*, 3 Ad. & *811] E. 138 (E. C. L. R. vol. 30), 4 N. & M. 652; *The Southampton Dock Company v. Richards*, 1 M. & Gr. 448 (E. C. L. R. vol. 39), 1 Scott N. R. 219; *The King v. The Inhabitants of Birmingham*, 8 B. & C. 29 (E. C. L. R. vol. 15), 2 M. & R. 230; *Thompson v. Harvey*, 4 Hurlst. & N. 254; *The Wolverhampton New Waterworks Company v. Hawksford*, 7 C. B. N. S. 795 (E. C. L. R. vol. 97), where an act was required to be done within a certain time; *Cole v. Green*, 7 Scott N. R. 682, 6 M. & G. 872 (E. C. L. R. vol. 46), where a particular mode of signature of a contract was directed." In *Morton v. Copeland*, 16 C. B. 517 (E. C. L. R. vol. 81), it was held that the consent under the 2d section of the Dramatic Copyright Act, 3 & 4 W. 4, c. 15, which imposes a penalty for the representation at any place of dramatic entertainment, "without the consent in writing of the author or proprietor," of any dramatic piece, &c., the sole liberty of representing which is by s. 1 secured to such author or proprietor, need not be under the hand of the author or proprietor himself, but may be given by an agent. [ERLE, C. J., referred to *The Queen v. The Mayor, &c., of Rochester*, 7 Ellis & B. 910 (E. C. L. R. vol. 90). WILLES, J.—If the contention on the other side be right, a corporation could not obtain an order under this section. The learned judge referred to *Cortis v. The Kent Waterworks Company*, 7 B. & C. 314 (E. C. L. R. vol. 14).] Upon an application under the 52d section, the court may dispense with the affidavit of the party, and yet the language of that section is almost identical with that of the section now in question,—“upon an affidavit of the party proposing to inter-

rogate, and his attorney or agent," &c. It would be extremely inconvenient if such verbal criticism should be allowed to prevail.

Kemplay, in support of his rule.—The court or judge are by the statute empowered to make the order "upon an affidavit by such party of his belief," &c. How can this affidavit be made by a third person? It *may be that a corporation could not avail itself of this section: if so, all that can be said, is, that it is casus [812] omissus. The court will not, however, be warranted in doing violence to the plain words of the statute merely because inconvenience may possibly result from giving them their ordinary construction. *Prima facie*, the language here used imports a condition precedent: *Scott v. Parker*, 1 Q. B. 809 (E. C. L. R. vol. 41), 1 Gale & D. 258. The word "upon" imports a condition: *The Queen v. John Humphery*, 10 Ad. & E. 335, 2 P. & D. 691. The language of the acts of parliament upon which the decisions in *Cole v. Green*, *Morton v. Copeland*, and *The Wolverhampton New Waterworks Company v. Hawksford* proceeded, was obviously directory only, and not conditional. [ERLE, C. J.—Can you suggest any reason for the distinction between the language of the two sections?] The court cannot speculate on the intention of the legislature: all they have to do, is, to construe the language which the legislature has used, according to the ordinary and approved rules of construction. [ERLE, C. J.—What do you say to the case of a nominal plaintiff? The obligor lends his name to the assignee of the bond: who is to make the affidavit?] The party whose name appears upon the record. There is no ambiguity in the language of the section.

ERLE, C. J.—I am of opinion that this rule must be made absolute. There are many reasons which make me very unwilling to hold to the extreme letter of the statute, and I have anxiously looked round to see if I could avail myself of any rule to allow of some relaxation of its strictness. But the words are few and very positive and precise: and I feel bound to give effect to them, although I much doubt whether in so doing I am giving effect to the spirit and intention of the legislature.

*WILLIAMS, J.—I also think we are bound by the unequivocal language of the statute. [*813]

WILLES, J.—I am not disposed to differ from the opinion expressed by my Lord and my Brother Williams, though I must confess I should have thought we might have arrived at a satisfactory conclusion by acting upon the rule laid down by Lord Wensleydale in *Becke v. Smith*, 2 M. & W. 191, 195, upon the authority of *Burton, J.*, in *Warburton v. Loveland d. Ivie*, 1 Hudson & Brooke 623, 648, where he says: "It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." I subscribe to every word of that, assuming the word "absurdity" to mean no more than "repugnance." With that modification, it seems to me that the rule thus laid down is perfectly consistent with good sense and law. Construing the 50th

section with reference to other parts of the statute, I think, if we found it to lead to any repugnancy if read in its ordinary sense, we might modify the language by holding it to be directory only and not imperative. I should have thought, that, comparing the 50th and the 52d sections together, and seeing that the object of the statute was to assist *all* suits by *all* suitors, and to give all equal remedies and equal means of acquiring or defending their rights, where the party himself was unable to make the necessary affidavit, the language of the former might be held to be directory and not conditional. The section deals expressly with discovery of documents by a corporation. *814] It would *seem strange, therefore, to hold, that, though the corporation are bound to make discovery, yet they would be precluded from availing themselves of the provision for enforcing it. I much regret that I feel compelled to concur in the conclusion at which the rest of the court have arrived: but I do not feel a sufficiently strong opinion upon the subject to induce me to say other than that I concur with them.

KEATING, J.—I also am of opinion that this rule should be made absolute. I should have been glad if we could have come to any other conclusion: but I find it to be impossible to escape from the very plain words of the act. The jurisdiction we are called upon to exercise is to be exercised upon an affidavit being made by *the party*, of *his* belief, &c. I am unable to get over the strength of those words. They have already undergone consideration in the Court of Exchequer in the case of *Herschfeld v. Clarke*, 11 Exch. 712; and, though that case is not in all respects satisfactory, yet, as far as the judgment of the Court of Exchequer goes, their expression of opinion is perfectly unequivocal. Rule absolute.

*815]

*LEIGH v. PENDLEBURY. Jan. 29.

A certificate of registration of a deed of arrangement, under the 198th section of the Bankruptcy Act, 1861, is no answer to an action by a non-executing-creditor, if the deed contains covenants which are unreasonable or contrary to the general scope and policy of the bankrupt laws.

Thus, a stipulation that creditors shall verify their debts by solemn declaration or otherwise to the satisfaction of the trustee, renders the deed void: so, a covenant not to sue, under penalty of losing the debt: so, a covenant that the trustee may [shall?] pay all creditors in full whose debts shall not amount to 10*l*.: so, a covenant that the decision of a majority of the executing creditors to discharge the trustee from the trusts of the deed shall bind all the rest of the creditors.

Semble, that a certificate of resignation under s. 198, by a person professing to be "acting for" the chief registrar in bankruptcy, is a sufficient certificate.

MILWARD, on a former day in this term, moved that the defendant might be discharged out of the custody of the sheriff of Lancashire, on the ground that he had prior to his arrest under the ca. sa. issued in this cause executed a deed of assignment of all his property and effects for the benefit of his creditors, which deed had received the assent of the required number of creditors, and had been duly registered under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.(a)

(a) The 192d section, "As to trust deeds for benefit of creditors, composition and insolvency deeds executed by a debtor," enacts that "every deed or instrument made or entered into

*The affidavit upon which the motion was founded,—that of the defendant's attorney,—stated that the defendant did on [816 the 23d of December, 1863, duly sign, seal, and deliver in his presence a deed of assignment for the equal benefit of his creditors (produced), and that such deed was also duly executed in his presence by the trustee therein named, and had also been signed or in writing assented to by a majority in number representing three-fourths in value of the creditors of the defendant, and had been duly registered *pursuant to the provisions of the Bankruptcy Act, 1861; [817 that, immediately on the execution of the said deed by the defendant, possession of all the property comprised therein of which the defendant could give or order possession, was given to the said trustee; that, by a memorandum endorsed on the said deed, it appeared, that the same was brought into the office of the chief registrar of the Court of Bankruptcy for registration on the 12th of January, 1864, and that the certificate of registration and protection to the debtor produced (dated the 14th) was subsequently issued; that, on the 13th of January instant, the defendant was arrested under a ca. sa. issued in this action, and remained in custody; and that the said certificate of registration and protection to the debtor was produced to the sheriff's officer on the 15th, but the officer refused to discharge the defendant without a judge's order.

C. Russell, who was instructed to show cause in the first instance, submitted that the certificate of the registrar, which was simply a ministerial act, was no evidence that the condition precedent, viz., the execution of a proper deed by the requisite number of creditors, has

between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed, that is to say:—

"1. A majority in number representing three fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument:

"2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same:

"3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor:

"4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered:

"5. Together with such deed or instrument, there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three fourths in value of the creditors of the debtor whose debts amount to 10*l.* or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed:

"6. Such deed or instrument shall, before registration, bear such ordinary and ad valorem stamp duties as are hereinafter [s. 195] provided:

"7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

And s. 198 provides, that, "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy."

been complied with. [ERLE, C. J.—Is not the affidavit of the attorney *prima facie* evidence that the deed has been duly signed?] It is submitted not. For anything that appears, this may have been a deed *818] under s. 194.(a) and the registrar's certificate may be *for that. The Lord Chancellor, in *Ex parte Morgan, In re Woodhouse*, 32 Law J., Bankruptcy, 15, 18, points out the distinction between the two descriptions of deeds. "A deed under the 192d section," he says, "is to be registered by the deed being brought into the office of the chief registrar, and the solemnities attending its registration are distinctly defined. A deed under the 194th section is directed to be registered simply in the Court of Bankruptcy. For convenience sake, by a general order,(b) both forms of registration have been directed to be made by the same officer in the same office. But registration under one section is very different from registration under the other. The 194th section was introduced with a double view: first, because it was apprehended that many deeds of composition might still be made which would not be brought under the 192d section; and which might have an injurious effect by reason of their being secret deeds of arrangement. The obligation, therefore, was imposed upon all persons executing such a deed, of bringing it in within twenty-eight days; and a penalty is attached in case of default, that the deed shall not be receivable in evidence. Another object of the enactment was this: it was thought that many deeds of composition might not be perfected in the manner required by the 192d section within twenty-eight days, and yet the creditors might be willing to accede to such *819] a deed. Therefore power was given, under the 194th section, to register a deed which did not comply with the requirements of the 192d section. The two forms of registration being very different, the consequences of the one form do not attach to the other. The consequence of an observance in every respect of the terms of the 192d section, is, that the deed is binding on the minority who do not execute the deed. No such consequence attaches to registration under the 194th section." [WILLIAMS, J.—If it is apparent on the face of the certificate that the deed is a deed under the 192d section, must we not assume that the registrar would not have registered it unless all the conditions of the statute had been complied with?] The certificate in question does not purport to be the certificate of the chief registrar.(c) [ERLE, C. J.—It is given by Mr. Bethell, who is stated therein to be "acting for" the chief registrar. It would be easy to rectify that, if necessary. But I must confess I see nothing to satisfy us that this is a certificate of the registration of a deed under s. 192.] The latter part of s. 197,—which provides, that, "except where the

(a) Which enacts that "every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding-up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow, be registered in the Court of Bankruptcy; and, in default thereof, shall not be received in evidence."

(b) Made under the authority of a G.O., dated October 12th, 1861. See *Nicol's Bankruptcy Acts*, p. 214, et seq.

(c) The General Orders of October, 1861, give only one form of certificate of registration, under s. 198: see No. 67, *Nicol*, p. 248.

deed shall expressly provide otherwise, *the court*" (that is, the Court of Bankruptcy) "shall determine all questions arising under the deed according to the law and practice in bankruptcy so far as that may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged a bankrupt, and his estate were administered in bankruptcy,"—seems to show that the Court of Bankruptcy, and not this court, is the proper place to which this application should have been addressed. [ERLE, C. J.—Under s. 112 of the 12 & 13 Vict. c. 106, the debtor might *have obtained relief in the Court of Bankruptcy. *Milward*.—The application would have to be made [*820 to the district commissioner: and probably it would in this case have been made to that tribunal, but the commissioner is absent for an indefinite time. It is submitted, however, that this court has unquestionably jurisdiction, and will hardly abandon it. WILLES, J.—The act of parliament gives a jurisdiction to the Court of Bankruptcy. This court, of course, can interfere under its common-law power, to prevent an abuse of its process. But there are means of inquiry in the Court of Bankruptcy which we do not possess.]

Russell stating that he wished to have an opportunity to impeach the validity of the deed,—a copy having been handed to him,—a rule nisi was granted, and the further hearing postponed.(a)

(a) The deed was as follows,—

"This indenture, made the 23d day of December, 1863, Between Joshua Pendlebury, of, &c., corn-merchant (hereinafter called 'the said debtor'), of the first part, Joseph Walton, of, &c., corn-merchant (hereinafter called 'the said trustee'), of the second part, and the several other persons whose names and seals are hereunto subscribed and affixed (being creditors in their own right solely, or in copartnership with others, of the said debtor, or agents of such creditors), of the third part: Whereas, the said debtor is indebted unto his creditors in several sums of money which he is unable fully to discharge, and hath therefore agreed to execute the conveyance and assignment hereinafter mentioned: Now, this indenture witnesseth, that, in pursuance of such agreement, and in consideration of the premises, the said debtor doth hereby grant, convey, bargain, sell, assign, transfer, and set over unto the said trustee, his heirs, executors, administrators, and assigns, All and every the freehold, real and leasehold estates, stock in trade, wares, merchandise, fixtures, household and other goods, chattels, of every description, sum and sums of money, debts due and owing, ready money and securities for money, books, papers, and writings, and all other the real and personal estate and effects whatsoever or wheresoever, whether in possession, reversion, remainder, or expectancy, of him the said debtor, with power of entry to take all such goods and chattels, And all the estate, term of years, right, title, interest, benefit, claim, and demand of the said debtor of, in, to, or out of the same respectively, To have, hold, receive, and take the said estate, effects, and premises hereby conveyed and assigned, and all benefit thereof, unto the said trustee, his heirs, executors, administrators, and assigns, according to the nature thereof respectively, Upon trust that he the said trustee, his heirs, executors, administrators, and assigns, or the trustee or trustees for the time being, do and shall with all convenient speed, absolutely sell and dispose of all the said freehold, real and leasehold estates, and of other the said estate and effects which are in their nature saleable, either by public auction or private contract, and either together or in lots, and upon such special terms and conditions as to title or otherwise as the trustees or trustee for the time being shall think fit, for the best price or prices that can be obtained for the same, with liberty to buy in and resell and also to give credit for the estate and effects so sold, or to take any security for the purchase-money or any part thereof, and to collect and receive all the debts and sums of money due and owing as aforesaid, and do stand possessed of the money arising under these presents upon the trusts hereinafter declared: And the said debtor doth hereby appoint the said trustee, his executors and administrators, and all future trustees, his true and lawful attorney and attorneys, to ask, demand, sue for, recover, and receive all debts and sums of money and all other the premises hereby assigned, and on payment or delivery thereof, or of any part thereof respectively, to sign, seal, and execute receipts, acquittances, or other discharges for the same respectively, and on non-payment or non-

*821] **Milward* now produced an affidavit of the defendant himself, in which he deposed as follows:—"That I am now in the

delivery thereof to commence and prosecute any action, suit, or other proceedings for recovery and compelling the payment or delivery thereof respectively, and to adjust, liquidate, and finally settle all accounts, dealings, and transactions whatsoever relating to the said trust-estate and premises, and for all or any of the purposes aforesaid to use the name of the said debtor, he being indemnified against all costs and expenses in consequence of the exercise of this present power: And it is hereby declared that every receipt of the trustees or trustee for the time being for any money hereby made payable to them or him shall effectually discharge the persons paying the same from being obliged to see to the application thereof, or from being answerable or accountable for the misapplication or non-application thereof: and it is hereby declared that the said trustee, his executors or administrators, shall stand possessed of the moneys which shall arise or be received by or under these presents, in trust to pay all costs, charges, and expenses which may be sustained in or about calling meetings of creditors, proposing, preparing, engrossing, and executing these presents, or in or about the execution of the trusts and powers thereof, and all rent and taxes; and, in the next place, to pay, retain, and satisfy rateably and proportionably, and without any preference and priority, to him the said trustee and his partners (if any) and the other persons parties hereto of the third part, the several debts or sums set opposite to their respective names, and to all other (if any) the creditors of the said debtor, their respective debts,—subject to the stipulation hereinafter contained for verifying the amount thereof; and to pay the residue of the said moneys unto the said debtor, his executors, administrators, or assigns: *Provided, nevertheless, that it shall be lawful for the trustees or trustee for the time being to require the amount of any debt or debts of any of the several creditors, or of any security for the same, to be verified by solemn declaration or in such other manner as to such trustees or trustee shall seem expedient; and, in the event of any such creditor or creditors refusing or failing so to verify his or their debt or debts or security, then such creditor or creditors so refusing or failing as aforesaid shall lose all benefit, dividends, and advantage to be derived from or otherwise claimed under these presents, anything herein contained to the contrary notwithstanding: And the said debtor doth hereby, for himself, his heirs, executors, and administrators, covenant with the said trustee, his heirs, executors, and administrators, that he the said debtor shall and will to the best of his power forthwith make and deliver a true and correct account in writing of all his debts and affairs, and aid and assist the trustees or trustee for the time being in the management of the affairs of the said trust estate; and shall not receive or intermeddle with any of the said trust-estate, except under the direction of the trustees or trustee for the time being: And it is hereby declared that it shall be lawful for the trustees or trustee for the time being to employ the said debtor or any other person or persons in winding up the affairs of him the said debtor, and in collecting and getting in his estate and effects hereby conveyed and assigned, and in carrying on his trade, if thought expedient by them or him, until they or he can advantageously dispose of the same or the goodwill thereof, and to allow the said debtor, or any other person or persons so employed as aforesaid, out of the trust-estate, for his or their services, such sum or sums as to the said trustees or trustee for the time being shall seem proper: And the said several persons, parties hereto of the second and third parts respectively, in consideration of the premises, do hereby for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant with the said debtor, his heirs, executors, and administrators, that they the said parties hereto of the second and third parts respectively shall and will accept and take the dividend and dividends to be made under and in pursuance of these presents in full satisfaction and discharge of their several debts now owing to them respectively by the said debtor, without prejudice to any security from third persons for the same; and shall not nor will at any time hereafter sue, arrest, attach, take in execution, or otherwise impede or encumber him the said debtor in any manner on account of their said several debts; and, if any of them shall do so contrary to the intent and meaning of these presents, then the said debtor, his heirs, executors, and administrators, shall be and is and are for ever hereby declared to be clearly acquitted, exonerated, and discharged of and from all actions, suits, debts, and demands whatsoever of the creditor or creditors by whom he shall be so sued, arrested, attached, taken in execution or otherwise impeded or encumbered, and these presents may be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could do: Provided always that the trustees or trustee for the time being are hereby authorized and empowered to pay in full all these creditors whose debts are under 10*l.*, or to make such arrangements with them as may be deemed expedient: And it is hereby agreed, that, as often as the funds arising from the sale of any part of the estate and effects, or from the collection of the debts owing to the said estate, shall amount to 10*l.* or upwards, the amount thereof shall be paid into the banking-house of ——— in the name of the said trustee for the*

custody of the sheriff of Lancashire under a writ of ca. sa. issued in the above cause, and that I was arrested thereunder on the 13th of January *instant: That, on, the 23d of December last, I duly signed and delivered a certain deed or instrument, bearing [*822 date the same 23d of December last, and made between myself of the first part, Joseph Walton, therein described, of the second part, and the *several other persons whose names and seals are thereunto subscribed and affixed (being my creditors in their own right [*823 solely or in copartnership with others, or agents of such creditors), of the third part,—being a deed of assignment of all my real and personal *estate to the said Joseph Walton as a trustee, in trust for [*824 the equal benefit of all my creditors: That such deed was after the execution thereof by me, and before the registration thereof on the 12th of January instant, as hereinafter mentioned, duly signed or in *writing assented to and approved of by three-fourths in [*825 number and value of my creditors whose debts respectively amount to 10% and upwards: That the statement thereunto annexed contains a true and correct list of all my creditors whose debts respectively amount to 10% and upwards, and it is therein stated truly and correctly whether the said creditors assent to or dissent from the said deed or instrument: That the said Joseph Walton, the trustee appointed by the said deed or instrument, duly executed the same in my presence on the 24th of December last: That the execution of such deed or instrument by myself was duly attested by Mr. R. H., an attorney and solicitor in Stockport, in the county of Chester: That within twenty-eight days from the day of the execution of such deed or instrument by myself, viz. on the 12th of January instant, the same was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy, for the purpose of being registered: That, together with such *deed [*826 or instrument, there was delivered to the chief registrar an affidavit by myself and a certificate by the said trustee, that a majority in number representing three-fourths in value of my creditors whose debts amounted to 10% and upwards had in writing assented to or approved of such deed or instrument, and also stating the amount in value of my property and credits comprised in such deed: That such

time being; and that all checks or orders for drawing thereout any moneys shall be signed by the trustees or trustee for the time being: *Provided always and it is hereby agreed and declared that every resolution signed by the majority in number and value of the creditors parties hereto shall be binding on all the parties hereto, and shall be effectual for the allowance and passing the accounts of all trustees acting hereunder, and for discharging them from the trusts hereof and from all claims and demands in respect thereof:* And, lastly, that all powers and questions relating to contracts by the said debtor, or to the compounding of debts or the submitting disputes to arbitration, or the payment of wages or salaries to clerks, servants, labourers, workmen, or to apprentices, or powers or questions relating to the discharge of apprentices, or to creditors having securities for their debts, or to the allowance to the said debtor, or dividends under this deed, or powers or questions relating generally to the trust-estate and creditors or their debts, and not herein expressly provided for, shall be exercised and dealt with by the trustees according to the English bankrupt law.

"JOSHUA PENDLEBURY,

"J. WALTON.

"Signed, sealed, and delivered by the said Joshua Pendlebury and Joseph Walton in the presence of

"RALPH HOWARD,
Solicitor, Stockport."

Then followed the signatures and seals of several creditors, with the amounts of their respective debts.

deed or instrument did before registration bear such ordinary and ad valorem stamps as are required by the Bankruptcy Act, 1861: That, immediately after my execution of the said deed or instrument, possession of all the property comprised therein of which I could give or order possession was given to the said trustee: That the date, names, and descriptions of the parties to such deed or instrument not including the creditors, together with a short statement of the nature and effect thereof, was duly delivered to the chief registrar, to be entered by him in the book kept for that purpose: That such entry was made within forty-eight hours after the said deed had been left with the chief registrar as aforesaid, and a copy of such entry was published in the London Gazette within four days after the making such entry: And that the certificate of the registration of the said deed is signed by the person who on the 14th day of January instant, the date thereof, was acting for and on behalf of the chief registrar of the Court of Bankruptcy."

Russell.—The formal preliminaries of the statute seem to have been complied with: but the deed itself is open to several objections. It is not for the equal benefit of all the creditors of the defendant, and it contains covenants which are unreasonable. First, there is a clause that all the creditors who execute the deed shall verify their debts by solemn declaration or otherwise to the satisfaction of the trustee, under the *penalty of losing all benefit under the
*827] deed. That clearly is a condition to which creditors are not bound to submit. The second objection is, that the deed contains a covenant on the part of the creditors not to sue, such as this court in *Legg v. Cheesebrough*, 5 C. B. N. S. 741, and the Court of Exchequer in *Dell v. King*, 2 Hurlst. & Colt. 84, held to render the deed void. The third objection is, that it provides for the payment in full of all creditors whose debts shall be under 10*l*. The fourth objection is, that the deed contains a clause by which the majority of the *executing* creditors might bind the minority, and discharge the trustee from all the trusts. It may be that the payment in full of the 10*l*. creditors will render the estate valueless to the other creditors: and there is nothing in the bankrupt laws to warrant it. *Ex parte Spyer*, In re Josephs, 32 Law J., Bankruptcy, 62, it was held that a power in a deed of assignment for the benefit of creditors enabling the trustees to make such arrangements with the creditors whose debts are under 10*l*. as they may deem expedient, is inconsistent with the Bankruptcy Act, 1861; but that, where the deed showed a clear intention that the estate should be administered as in bankruptcy, the particular power might be rejected as repugnant to the general tenor of the deed, and that its existence formed no objection to the validity of the deed, nor to the capacity of registering it under the statute. "If," said Lord Westbury, C., "it had been a trust or absolute direction to pay, there might have been ground for the objection; but, inasmuch as the deed proposes only to give liberty to the trustees, if the execution of that liberty be at variance with the duty and obligation of the trustee as declared by the rest of the deed and the law applicable to it, then, the liberty being repugnant to the higher duty, is simply a power which the trustee has no right to exercise."

**Milward*, in support of his rule.—It is not contended that the deed would be good, if it contained clauses which it would be unreasonable to ask a creditor to assent to, or affected to introduce conditions to which creditors under a bankruptcy would not be subjected. But the 197th section subjects all questions upon the deed to the law and practice in bankruptcy: it enacts, that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy: and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy." *Ex parte Spyer*, *In re Josephs*, is an express authority to show that a mere power to the trustee to pay 10% creditors in full does not invalidate the deed, inasmuch as that would be controlled by the general law of bankruptcy. *Dell v. King*, 2 Hurlst. & Colt. 84, has no analogy to this: that was the case of a composition deed; whereas, this is an absolute assignment for the general benefit of creditors. As to the clause enabling the trustee to require the claims to be verified, that clearly is not unreasonable: there must be some power of inquiry. The objection that the deed contains a covenant that the minority shall be bound by the decision of the majority of the executing creditors is unreasonable and bad, is without foundation: it is a universal rule in bankruptcy, as in all matters which are to be determined by a majority, that the minority are bound.

ERLE, C. J.—I am of opinion that this rule should be discharged. It is a rule for discharging the defendant out of custody, on the ground that he has executed a deed of assignment according to the 192d section of the Bankruptcy Act, 1861, assented to by the requisite number and value of creditors of the defendant, and so the plaintiff, a non-executing creditor, is bound, and consequently that the certificate of registration under s. 198 operates as a complete protection against arrest. The rule is opposed, on the ground that the protection which was given to the defendant was founded upon an invalid deed: and thus we are called upon to decide incidentally, upon a motion to the discretion of the court in regulating the conduct of its officer, without any power of appeal, as to the validity or invalidity of an important deed which regulates the rights of a debtor and a large body of creditors. I think we are bound by the decision we already have come to in the case of *Ilderton v. Jewell*, 14 C. B. N. S. 665 (*E. C. L. R.* vol. 108), (a) to hold that the certificate alone, if the

(a) Affirmed in error, sittings after Hilary Term, 1864.

court be satisfied that it is founded upon an invalid deed, does not entitle the debtor to his discharge. It becomes therefore necessary to go into the question whether this deed can be impeached upon any *830] of the grounds which have been urged before us; and I feel *bound to say that the objections urged by Mr. Russell are sufficient to satisfy me that the deed does contain provisions which are unequal and unreasonable. I think the clause giving the trustee power to admit or reject a debt which he might deem insufficiently proved, is most unreasonable if carried out in terms. I must take the covenant, sitting in a court of law, according to its legal effect. I cannot modify or alter it. It seems to me to be altogether unreasonable to call upon a creditor to submit his claim to the decision of the trustee. The clause which declares the debt forfeited if the creditor shall seek to substantiate his claim by an action, is also unreasonable. So also the clause enabling the trustee to pay in full creditors whose debts are under 10*l.*, is unequal and unreasonable. It gives the trustee the option of doing that which may leave nothing to be distributed amongst the rest of the creditors. We are bound by *Woods v. Foote*. 1 Hurlst. & Colt. 841, and several other cases, to go into these considerations, because it has been held, that, if the deed contains covenants which it is unreasonable to call upon a creditor to consent to be bound by, it affords no answer to a claim by a non-executing creditor. If we were to hold the defendant to be entitled to his discharge, we should in effect be giving a judgment in his favour upon the validity of the deed. For the reasons I have stated, I think the deed is not a valid deed, and consequently that the certificate of registration under the 198th section affords the defendant no protection.

WILLIAMS, J.—I am of the same opinion. The defendant is legally in custody under a writ of ca. sa. We are asked to direct our officer to discharge him, because he has obtained a certificate of the due *831] registration of a deed of arrangement under the 192d *section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. It seems to me that we are not bound to discharge the defendant, unless satisfied that the certificate is founded upon a valid deed. I think that that is not sufficiently made to appear, and consequently that the rule must be discharged.

WILLES, J.—I am of the same opinion. The certificate of the registration of the deed is in a general form. I cannot look upon it as an act of the Court of Bankruptcy to which implicit credence is to be given. I think it is the duty of this court to look at the deed in order to satisfy itself as to whether or not it is such a one as ought to have led to a certificate of protection, under section 198. The deed contains, amongst others, the following clause,—“Provided, nevertheless, that it shall be lawful for the trustees or trustee for the time being to require the amount of any debt or debts of any of the several creditors, or any security for the same, to be verified by solemn declaration, or in such other manner as to such trustees or trustee shall seem expedient:” and, in the event of a refusal to submit to this, the creditor so refusing is to lose all benefit under the deed. Is that reasonable? I must say I think it is not. There is nothing in any of the decisions to justify a non-executing creditor being thus placed at the mercy of the trustee. In *Ex parte Spyder*,

which has been referred to, the verification was to be at the expense of the trust estate. The words of the covenant there were,—“Provided always, and it is hereby covenanted and agreed by and between the several parties hereto, that it shall be lawful for the said James Spyer (the trustee), at the expense of the said trust estate, to require the amount of any debt or debts of any or either of the several creditors parties hereto to be verified by solemn declaration or in such *other manner as to the said trustee shall seem expedient;” and “in the event of any such creditor or creditors [*332 refusing or failing so to verify his or their debt or debts, or declining to execute these presents, then such creditor or creditors so refusing or failing or declining as aforesaid, shall lose all benefit, dividends, and advantage to be derived from or otherwise claimed under these presents, anything herein contained to the contrary notwithstanding.” This clause was rejected by the Lord Chancellor as being nonsense, because “it enabled the trustee to require the amount of debt of any of the creditors *parties thereto* to be verified; and, in the event of *such* creditor or creditors refusing to execute, such creditor or creditors so refusing, &c., should lose all benefit.” That case, therefore, is no authority in favour of the defendant here. I agree with my Lord in thinking that this clause, as well as the others which he has referred to, is unreasonable. Then arises the question, what is to be the effect of a deed containing clauses which are unreasonable and not authorized by the statute, so that non-executing creditors are not bound by it? Are we to excise them, and read the deed without them? or are we to treat it altogether as a void and unauthorized deed? *Ex parte Spyer* seems to be an authority for the excision of the void covenants. But I own I feel great difficulty in applying that authority here. The objection goes to the very essence of the deed; dealing with the mode in which the debts are to be ascertained and the dividend paid. Further, there is the authority of the Court of Exchequer in *Woods v. Foote*, 1 Hurlst. & Colt. 841, that a clause that is unreasonable cannot be rejected, and the rest of the deed held good; but that the whole must be held void. Upon the authority of that case I think we are bound to hold that this deed cannot be sustained. The silence of the *certificate upon the subject does not prevent us from [*833 inquiring whether or not the requisites of s. 192 have been complied with.

KEATING, J.—I am of the same opinion. The case of *Ilderton v. Jewell* is an authority to show that the certificate of the registrar, to have any avail, must appear to be founded upon a valid deed under s. 192. This deed, for the reasons already given, is not a valid deed, and therefore the certificate which the defendant has obtained does not entitle him to be discharged from custody.

ERLE, C. J.—There being some difficulty about the application of this new law we think there should be no costs of this rule.

Rule discharged, without costs.

In re SARAH CLOUD. Jan. 13.

The court will not allow the wife of a lunatic to convey her separate estate, under the 3 & 4 W. 4, c. 74, s. 91, without some explanation as to the nature of the lunatic's property, and whether it contributes to the wife's support.

ANSTIE moved for an order under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband of the applicant in a deed conveying separate property of the wife, upon an affidavit that the husband was a lunatic and confined in an asylum. The affidavit upon which the motion was founded contained merely a description of the property sought to be conveyed and how it came to the wife.

ERLE, C. J.—We must have a little more detail as to the ratio which the property sought to be conveyed bears to the property or means of the parties.

*834] *WILLES, J.—We should also be informed whether the property of the lunatic contributes to the support of the applicant, and whether there was any settlement upon the marriage of the parties.

The motion was renewed in Easter Term; but, the required information not having been supplied, *Anstie* took nothing.

MILLER v. LAWTON. Jan. 15.

In an action for the breach of a warranty on the sale of a horse by the servant of a private owner at a fair,—Held, that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty and averring a breach of it, and an answer from the defendant simply denying that there had been any breach of warranty, afforded evidence whence the jury were justified in finding that the servant had authority in fact to warrant.

THIS was an action by the plaintiff, a horse-dealer in London, against the defendant, a merchant at Liverpool, for the alleged breach of a warranty on the sale of a horse at Lincoln Fair.

The cause was tried before Byles, J., at the sittings in London after last Michaelmas Term. The facts were as follows:—The defendant had sent his servant Wright with the horse in question to Lincoln Fair. It was bought for 35*l.* by an agent of the plaintiff, Wright signing a warranty that the horse was "sound, free from vice, and quiet to drive." On getting the horse home, the plaintiff discovered that it was not quiet to drive.

On the part of the defendant it was submitted, upon the authority of *Brady v. Todd*, 9 C. B. N. S. 592 (E. C. L. R. vol. 99), that the servant of a private owner intrusted to sell a horse has no authority to warrant it.

Two letters were put in on behalf of the plaintiff, from which it was sought to be established that Wright in fact had authority to warrant on the particular occasion. The first was a letter dated the *835] 2d of June, 1863, *written by the plaintiff's attorney to the defendant, in which it was alleged that the horse had been warranted "sound, free from vice, and quiet to drive," and that the warranty was false. The other was the defendant's answer, dated the

7th, in which, taking no notice of the assertion that his servant had given a warranty in the terms stated, the defendant contented himself with a general denial that there had been any breach of warranty.

The servant, Wright, who was called as a witness on the part of the plaintiff to prove the warranty, was not asked by either counsel whether or not he had authority to give the warranty he did.

The learned judge left it to the jury to say whether any one of the warranties was broken; telling them, that, if they thought it had, they must find for the plaintiff.

The jury returned a verdict for the plaintiff, damages 35*l*.

Hawkins, Q. C., pursuant to leave reserved to him at the trial, moved for a rule to enter a verdict for the defendant, or for a new trial, on the ground of misdirection. He submitted that there was no evidence to go to the jury that Wright had any authority from the defendant to warrant the horse. He also produced an affidavit of the defendant, in which he positively swore that he had given Wright no authority to warrant the horse, except in respect to soundness.

ERLE, C. J.—I think there should be no rule in this case. Looking at the two letters and at the surrounding circumstances, it seems to me that there was *some* evidence from which the jury might fairly infer an admission on the part of the defendant that his servant had authority to give the warranty he did. *The attorney's letter [*836 does not profess to set out the terms of the warranty, but merely to refer to it. And in his answer the defendant does not deny, and consequently must be taken to admit, that the servant had authority to give that warranty. In *Brady v. Todd*, this court—in deciding that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is not *by law* authorized to bind his master by a warranty, and therefore that the buyer taking such a warranty takes it at the risk of being able to prove that the servant had *in fact* his master's authority for giving it,—expressly decline to give any opinion upon the case of “a special agent intrusted with the sale of a horse in a fair or other public mart where stranger meets stranger, and the usual course of business is for the person in possession of the horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale.” It is not, however, necessary to resort to that in this case, because there was evidence from which the jury were warranted in inferring that Wright had express authority to warrant as he did.

WILLIAMS, J.—I am of the same opinion. It is unnecessary to give any opinion as to what would have been the result of the evidence if the two letters had not formed part of it. It is also unnecessary to consider the point reserved in the case of *Brady v. Todd*, because here there was some evidence that Wright, the defendant's servant, had authority to give the warranty which he did give.

The rest of the court concurring,

Rule refused.

*837]

*WILCOX v. ODDEN. Jan. 19.

The defendant's goods having been taken under a *f. fa.* after the debt and costs had been paid by another party liable upon the same instrument, he applied to a judge to set aside the execution. The judge made the order, but imposed as a term *that the defendant should bring no action.* Having availed himself of the order so as to get the sheriff to withdraw from possession,—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action.

THE defendant and another person, as sureties for one Howard, had given with him a joint and several promissory note to the plaintiff for 15*l.* The note being dishonoured, three writs were issued against the parties, and judgment obtained against them. After a sum of 7*l.* had been paid by one of the parties, and the whole debt and costs by another, an execution was levied upon the goods of the now defendant for the full amount, in consequence of which it was alleged that his business was wholly ruined. Application was made to Keating, J., at Chambers, to set aside the execution; and the learned judge made an order to that effect; but, as the judgment was regular so far as related to the costs, he made it a condition of granting the order that no action should be brought.

Morgan Lloyd now moved to vary that order by striking out the condition.—He submitted, that, where the party applying to set aside the proceedings for irregularity does not ask for costs, the judge has no power to put him under terms; and that, at all events, it was not a usual exercise of discretion to do so. [WILLES, J.—Has the order been acted upon?] It was served upon the sheriff, who thereupon withdrew from possession. Not to have served the order would have been to abandon it. [WILLES, J.—Having taken a benefit under the order, you cannot now complain of it. That was so distinctly held by this court in *Hayward v. Duff*, 12 C. B. N. S. 364 (E. C. L. R. vol. 104). There, the defendant, having been arrested on a *ca. sa.* after the plaintiff had proved his debt under a fiat against him, applied by summons for his discharge and to set aside the *ca. sa.* *838] judge made the order, imposing as a term that the defendant should bring no action. Having availed himself of the order so as to obtain his discharge, it was held that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action.] The sheriff appeared on the hearing of the summons; and, as a public officer, knowing that the order had been made, he would have acted upon it at once without waiting to be served. [ERLE, C. J.—*Pierce v. Chaplin*, 9 Q. B. 802 (E. C. L. R. vol. 58), goes straight to the point. There, on a motion at Chambers to set aside a judgment and execution for irregularity, on the alleged ground that the judgment had been signed pending a summons for time to plead, which summons the plaintiff's attorney denied having received, the judge made an order setting aside the judgment and execution without costs, but not embodying any decision as to the irregularity; and he added a direction that the defendant should bring no action. The defendant protested against this addition, but served the order upon the sheriff, who thereupon gave up the goods: and it was held that the defendant, having thus far availed himself of the order, could not apply to the court to rescind that part of it which

forbade the bringing an action. The defendant there did no more than you have done here.]

PER CURIAM.—We are all agreed that there should be no rule.

Rule refused.

*GOODMAN v. HOLROYD and Another. Feb. 1. [*839

It is no objection to interrogatories under the 51st section of the Common Law Procedure Act, 1854, that the answers, if given in the affirmative, will show that the execution of a deed upon which the defence is founded was obtained by fraud.

THIS was an action by the plaintiff, one of the registered public officers of The Birmingham Town and District Banking Company, as endorsees, against the defendants, as endorsers, of two bills of exchange. The defendants pleaded a deed of arrangement under the Bankruptcy Act, 1861: and the plaintiff replied that the signatures thereto were obtained by fraud.

In Trinity Vacation last, the plaintiff took out a summons calling upon the defendants to show cause why he should not be at liberty to deliver to them the following interrogatories,—

"1. Did you not, on or about the 31st of March last, deliver or cause to be delivered to the chief registrar in bankruptcy, with or without the deed set forth in your plea herein, an account, as an account to the best of your knowledge, information, and belief, or otherwise, of the debts to the amount of 10*l.* and upwards owing by you?

"2. Were the London Joint Stock Bank then your creditors? and to what amount were they such? Was the amount of that debt 14,807*l.* 19*s.* 10*d.*?

"3. What was the nature and subject-matter of that debt?

"4. Was it not, or was not some and what part of it, made up by bills of exchange, and what bills, accepted,—or promissory notes, and what notes,—made or endorsed by persons other than yourselves, and by you endorsed to the said bank?

"5. Was not the whole, or some and what part, of the said debt made up of amounts in respect of which you were not primarily liable, but liable only in the event of other persons failing to pay the said amounts?

"6. Were any and which of the said bills or notes not payable when you delivered in the said account on or about the said 31st of March last? What was the amount of the said bills or notes not then payable? [*840

"7. Did the said bank, at the time of your delivering in the said account as aforesaid on or about the said 31st of March, hold any and what security or securities for the said debt for the sum of 1731*l.* 14*s.* 11*d.*, or any other and what sum?

"8. Did not the bank then hold bills or notes with other names besides yours upon them in respect of other sums besides the said sum of 1731*l.* 14*s.* 11*d.*, and to what amount? If you have not done so, why have you not included such sums in the amount for which you state security to be so held?

"9. Were Ellis, Bannister & Co., at the time of your delivering in

the said account as aforesaid on or about the 31st of March last, your creditors, and for what amount? and what was the nature and subject-matter of their debt?

"10. Did they then hold any and what security or securities for that or any and what amount? and what was the nature of the security or securities?

"11. Were Overend, Gurney & Co., at the time of your delivering in the said account as aforesaid on or about the said 31st of March last, your creditors for any and what amount? and what was the nature and subject-matter of the debt owing to them?

"12. Had not the said Overend, Gurney & Co. then discounted many bills or notes or some bills or notes, and to what amount, endorsed by you, beyond the sum of 645*l.* 2*s.* 6*d.*? and, on the 1st of March, 1863, and at the time of your delivering in the said account as aforesaid, or on the 31st of March last, or on one or other of such days, did not the said Overend, Gurney & Co. still hold the same?

*841] "13. Did you return them in the said account as creditors for 645*l.* 2*s.* 6*d.* only? and, if not, why did you not return them as creditors in respect of the other bills or notes discounted by them beyond that sum?

"14. Did the said Overend, Gurney & Co. assent to or approve of the deed set forth in your pleas? and when did they do so? and who procured such assent and approval? and was not such assent accompanied by or in consequence of some special arrangement made between you and the said Overend, Gurney & Co. in reference to the amount owing to them, or some and what part thereof?

"15. Did W. Whitwell & Co., and when, in writing or otherwise, and how, assent to or approve of the said deed? Who procured such assent?

"16. Did you not, or did not some one, and whom, on your behalf, at or shortly before the time of procuring them to assent to or approve of the said deed, or at or before they assented to or approved of the same, pay or secure to them, and how, a sum of 500*l.*, or some other and what sum? and what was the consideration for such payment or security?

"17. Was not their claim against you, and when, reduced to 2236*l.* 0*s.* 10*d.*? Was not that amount returned or stated by you in the said account? When was the last payment made to them which reduced their claim to that amount?

"18. Did not the said W. Whitwell & Co., or some person, and who, on their behalf, refuse to give their assent to or approval of the said deed, unless the debt due to them at the time they were applied to for such assent or approval was reduced by 500*l.* or some other and what sum? State what passed between them and you or either of you on your applying to them for such written or other assent or approval.

*842] "19. If the communications with them were made *not by either of you in person, but by some one else, state by whom, and what is his address?

"20. Have you not paid the said W. Whitwell & Co. some and what sum, or given them some and what benefit or advantage, to induce them to assent to such deed? and when?

"21. What were the debts and liabilities due or incurred by you prior to the 31st of March last, and then unpaid and unsatisfied, besides those referred to in the above interrogatories? What were or are the names, addresses, and occupations of your creditors in respect of such debts and liabilities? And what were and are the amounts of the debts due to each? And what securities did they then hold?"

The above interrogatories having been disallowed by Keating, J.,

A. *Wills*, in Michaelmas Term last, obtained a rule nisi for their allowance. He submitted that the proposed interrogatories were within the rule now universally recognised and acted upon: and he referred to *Bayley v. Griffiths*, 1 Hurlst. & Colt. 429, where interrogatories of a very similar character were allowed by the Court of Exchequer. [KEATING, J.—The ground upon which I declined to allow the interrogatories, was, that the plaintiff was seeking to interrogate the defendants as to whether or not they could sustain their pleas.]

G. *W. Harrison* now showed cause.—This is in effect an appeal against the decision of a judge at Chambers. The interrogatories in question are not such as ought to be allowed: they are a mere attempt to compel the defendants not only to afford evidence to support the plaintiff's case, but to make them charge themselves with fraud. [WILLES, J.—This court held, in *Bartlett v. Lewis*, 12 C. B. N. S. 249 (E. C. L. R. vol. 104), that it is no ground of objection to interrogatories under the statute, that the answers, if given in the affirmative, would render the party interrogated liable to a criminal prosecution, though it may be good ground for refusing to answer. ERLE, C. J.—It has been held in one case that a defendant may interrogate his attorney as to circumstances which, if established, would render him unable to recover his bill. WILLES, J., referred to *The Attorney-General v. The Corporation of London*, 2 M'N. & G. 247, where it was ruled by Lord Cottenham that a plaintiff is entitled to discovery from the defendant, not only of that which constitutes his, the plaintiff's, title, but also for the purpose of repelling what he anticipates will be the case set up by the defendant. KEATING, J.—I disallowed these interrogatories on the ground that they did not seek to support the plaintiff's own case, but were an attempt to get at his adversaries'. But, if I had been aware that there was a replication of fraud, I should not have refused them.] Many of these interrogatories are directed solely to a discovery of the evidence by which the defendants' case is to be supported. [ERLE, C. J.—If there are any such, the judge will not allow them.]

Wills was not called upon.

ERLE, C. J.—The subject was very elaborately discussed in the case of *The Attorney-General v. The Corporation of London*, to which my Brother Willes has referred; and the principles there laid down show very satisfactorily to my mind, that in allowing these interrogatories, we shall do no wrong. If there are any of them which militate against the rule there adopted, the judge at Chambers will eliminate them. In the case of *Bayley v. Griffiths*, 1 Hurlst. & Colt. 429, where very similar interrogatories to these were allowed [*844] by the Court of Exchequer, Martin, B., in the course of the argument observes,—“The answers to these interrogatories relate as much to

the plaintiff's case as the defendant's. The plaintiff seeks to establish that the deed was not made *bonâ fide*, but fraudulently concocted; and, if the jury are satisfied of that, there is an end of it." And Bramwell, B., asks,—“Why is not this case within the rule laid down by Lord Redesdale (Redesd. Pl. 9), as to which it is said in Wigram on Discovery, 2d edit. 285, ‘that a plaintiff is entitled to a discovery of the case on which the defendant relies,—that, is, that the plaintiff is entitled to *know what the case is*,—admits of no doubt?’” That case seems to me to be decisive.

WILLIAMS, J.—I agree with my Lord. It is very material that there should be no misunderstanding as to the rule upon this subject. By allowing these interrogatories, I do not think we shall be at all interfering with the rule which excludes a party from prying into the evidence by which his adversary's case is to be supported. It is no violation of that rule to hold that a defendant may be interrogated in order to show that his defence is naught.

WILLES, J.—I entirely agree with the rest of the court that these interrogatories ought to be allowed. I retain the opinion I expressed in *Bartlett v. Lewis*, 12 C. B. N. S. 249 (E. C. L. R. vol. 104). We are not to be hampered, in administering the law under the Common Law Procedure Act, by the rules which regulate the practice of the Court of Chancery in the case of discovery. A flood of light, however, is thrown upon the subject by the elaborate judgment of Lord Cottenham in the case I adverted to, of *The Attorney-General v. The Corporation of London*. “Nothing can be more clear,” says *845] his Lordship, “from authority and universal practice, than that a plaintiff is entitled to discovery, not only of that which constitutes his own original title, but that he is also entitled to a discovery for the purpose of repelling what he anticipates will be the defence. Since replications have been disused, the plaintiff endeavours to obtain what he before would have got by a replication, by anticipating the defence if he knows what it is, and alleging those facts which, if true, would show that the defence is not available against him. An ordinary instance of this is a release which the plaintiff thinks he can impeach: in such a case the bill leaves untouched the question of the original title, but anticipates that the defendant will set up a release, and on this supposition charges that which would prevent the operation of the release. But a more ordinary case, and one more adapted to the immediate circumstances of the present, is, where a plaintiff anticipates the defence of purchase without notice. In this case the plaintiff makes the defendant pretend a purchase without notice, and then charges circumstances which would show that there was notice, so as to destroy the defence which he thinks will be set up. This is the ordinary method, where the plaintiff can anticipate what the defence will be: but, if a defence may be set up which he cannot anticipate, the universal practice, in order to meet the whole of the defendant's case, is, to ask the defendant what his defence is. It was said in argument that an answer has only two objects, the one for affording to the plaintiff the discovery of that which constitutes his title, and the other for enabling the defendant to set up what he relies upon as his defence: but I apprehend that there is, on the part of the plaintiff, a right in addition to

that which is stated in this proposition, and *that, independently of discovery to show his title, he is entitled to a discovery to repel the defence which he expects will be set up against it." And, after referring to some authorities, his Lordship proceeds, at p. 260, to say: "We have already seen that the plaintiff is entitled, not only to a discovery of that which constitutes his title, but also to a discovery of everything which may enable him to defeat the title which is expected to be set up against him. In the cases of *Jones v. Davis*, 16 Ves. 262, *Evans v. Harris*, 2 Ves. & B. 361, and *Harland v. Emerson*, 8 Bligh. N. S. 62, this is very distinctly stated and recognised as the practice of the court: and in *Stroud v. Deacon*, 1 Ves. sen. 37, where the bill charged that a deed, which was the defendant's title, contained evidence which would defeat it, the defendant was compelled to answer. Now, it is also perfectly clear, that, if the defendant pleads a deed which constitutes his title, he cannot be compelled to produce it, because it is his own title, and not that of the plaintiff: but, if the plaintiff alleges that that deed contains something which would show or support his (the plaintiff's) title, the defendant is bound to answer an interrogatory founded on that allegation, because, although the deed is the defendant's title, it may be the most important part of the evidence of the plaintiff, who may find in it a recognition of that which, if true, would supersede the title set up by the instrument itself."

KEATING, J.—I entirely agree with the view taken by the rest of the court: and I think that the exposition of the rule which has now been given will be very beneficial. The matter will be dealt with at Chambers in accordance with the principles above laid down.

Rule accordingly.

***MAKEHAM and Another, Assignees, &c., v. CROW. Feb. 1. [*847**

In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt,—the court allowed the defendant to plead an equitable plea of set-off for unliquidated damages arising out of the same contract.

THIS was an action for the price of certain machinery sold and delivered by the bankrupt to the defendant. The defendant having a counter-claim for unliquidated damages for non-performance of the contract on the part of the bankrupt,

Hannen, on a former day in this term, moved for leave to plead an equitable plea of set-off, setting up that claim. He submitted, that though, under the 6 G. 4, c. 16, a set-off for unliquidated damages was not allowed,—*Bell v. Carey*, 8 C. B. 887 (E. C. L. R. vol. 65),—yet that, since the 171st section of the 12 & 13 Vict. c. 106, and the 153d section of the 24 & 25 Vict. c. 134, which enable a creditor to prove for unliquidated damages, the objection to such a plea no longer existed, for that every claim which can be proved may now be set off.

A rule nisi having been granted,

Holl showed cause.—This is an attempt to set off a claim for unliquidated damages; and is founded upon the 171st section of the 12 & 13 Vict. c. 106, which enacts, that, "where there has been

mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the court," that is, the Court of Bankruptcy, "shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such *848] account, and no *more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." This is but a re-enactment of the 6 G. 4, c. 16, s. 50. The 153d section of the Bankruptcy Act, 1861, provides for proof in respect of unliquidated damages. It enacts, that, "if any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages, which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court acting in prosecution of such bankruptcy, to direct such damages to be assessed by a jury, either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be provable as if a debt due at the time of the bankruptcy; provided that, in case all necessary parties agree, the court shall have power to assess such damages without the intervention of a jury or a reference to a court of law." Therefore, the amount of the damages must be ascertained before they are provable, and consequently before they are capable of being set off. The object evidently was to keep the matter under the control of the Court of Bankruptcy,—an object which will be altogether evaded if a plea of this sort is allowed.

Hannen, in support of the rule.—The defendant seeks to plead this plea by way of equitable defence, on the ground that it would be inequitable to allow the plaintiffs to recover the full contract price for *849] the machinery, when the defendant may have a right to *recover damages to a larger amount under the same contract. The Court of Bankruptcy has no power to restrain the action in this court. Under the 171st section of the 12 & 13 Vict. c. 106, any claim that is provable may be set off. It is true that the 153d section of the 24 & 25 Vict. c. 134, empowers the Court of Bankruptcy to investigate the claim for unliquidated damages before a jury: but that does not alter the legal nature of the claim. Mutual credit is entirely the creature of the bankrupt law; and yet mutual credit is now pleaded.

PER CURIAM.—We think the plea should be allowed, the plaintiffs being at liberty to reply and demur. Rule absolute.

BARRY v. BARCLAY. Jan. 29.

In an action of slander, the defendant having obtained an order for the examination of two witnesses (whose names were given) in Australia,—the court, upon a motion to rescind the order, imposed as a term that the defendant should state what it was that he expected the witnesses to prove.

THIS was an action for slander. The cause being at issue, the defendant obtained an order for the examination of certain witnesses in Australia. The affidavit upon which the order was granted was made by the defendant's attorney, who swore "that John Upward, of Adelaide Street, Brisbane, Queensland, in the colony of Australia, and W. G. Greenhill, of Egmont, near Westbury, Launceston, Van Diemen's Land or Tasmania, are material and necessary witnesses for the above-named defendant in this cause, and I verily believe that the said defendant cannot proceed safely to the trial of it without their evidence; that the said John Upward is at present residing at Brisbane aforesaid, *and that the said W. G. Greenhill is at present residing at Egmont, near Westbury aforesaid, out of the jurisdiction of this honourable court; that the above-named defendant has a good defence to this action on the merits, as I am instructed and verily believe; and that this application is made bonâ fide for the purpose of procuring the evidence of the said John Upward and W. G. Greenhill, and not for delaying the plaintiff in the trial of this action, or otherwise."

Ballantine, Serjt., now moved to rescind this order.—He referred to *Castelli v. Groom*, 18 Q. B. 490 (E. C. L. R. vol. 83), where it was held to be in the discretion of the court to refuse a commission, if sufficient ground be not shown for requiring it. There, the Court of Queen's Bench refused a commission, where the only specific ground assigned was, that the parties were resident and one carrying on business in distant places abroad (Leghorn and Constantinople), and that they made the application bonâ fide. Lord Campbell said: "I do not lay down as a general rule that there may not be a commission to examine parties abroad on their own behalf. But it lies upon them to show that such a commission would be conducive to the due administration of justice: it is not enough to represent merely that they are living out of the jurisdiction of the court. If an examination abroad were granted on such terms, the mischief evidently follows, that recourse would constantly be had to this practice, by parties commencing suits, and not wishing to be examined in court." [WILLES, J.—Was the case where Lord Wensleydale laid it down that a commission for the examination of witnesses is of right when applied for in due time, cited there?] It appears not. [WILLIAMS, J.—Unless the party who makes the affidavit is guilty of perjury, justice cannot be done without a commission.] At all *events some account ought to be furnished of what it is that the proposed witnesses [*851 are expected to depose to.

ERLE, C. J.—I do not think we should be justified in depriving the defendant of his commission. But, under the circumstances, I think it reasonable that the defendant or his attorney should state what it is he expects the witnesses to prove. The matter may go back to Chambers for that purpose.

The rest of the court concurring,
Ballantine withdrew his motion.

BULL and Another v. CLARKE. Jan. 30.

Upon a motion for an inspection of the plaintiffs' books, which the defendant alleged to be necessary for the purpose of establishing a set-off in respect of commission which he claimed on sales effected by the plaintiffs through his introduction,—The court granted the rule, although the plaintiffs swore that there was no agreement to allow the defendant any commission: but held that the plaintiffs were entitled to seal up all those parts of the books which they pledged their oath that the defendant had no interest in.

THIS was an action for goods sold and delivered. The defendant pleaded a set-off in respect of commission upon sales of wines and spirits to persons introduced to the plaintiffs by him, pursuant to an alleged agreement.

The defendant, in order to enable him to make out his claim for commission, obtained an order "to inspect and take extracts from the plaintiffs' ledgers." He accordingly attended at the counting-house of the plaintiffs on the 19th of December last, and, a ledger being produced, he went through a great portion of the index, and selected therefrom the names of a number of persons, and claimed to inspect the accounts of such persons, some of which he was allowed to inspect, it *being admitted that those customers had been introduced by him, but others of which accounts the plaintiffs refused to allow him to inspect, alleging that some of them had been wholly contracted prior to 1853 (at which time the alleged agreement to allow the defendant commission was first entered into), that others of them had partly been contracted prior to 1853 and partly since, and that the defendant had not introduced the customers; and as to the remainder, that, although contracted subsequently to 1853, the defendant had not introduced the customers, and therefore was not entitled to inspect those accounts at all.

On the 24th of December, a summons was taken out, calling upon the plaintiffs to show cause why the defendant should not have a further and better inspection of their ledgers, pursuant to the former order. On this summons coming on for a hearing, the learned judge referred the matter to the court.

T. Salter, on a former day, accordingly obtained a rule nisi for a better inspection. In the affidavit produced in support of the motion, the defendant stated that he claimed to have introduced to the plaintiffs all the persons whose names were mentioned in a list annexed, and several others; and that he claimed commission upon the accounts of all such persons, and that whether the same were contracted prior or subsequently to the year 1853, as by his agreement with the plaintiffs he was to have such commission not only upon future but past accounts.

J. Brown now showed cause, upon affidavits denying, that, in the year 1853, or at any other time, it was agreed between the plaintiffs and the defendant that the plaintiffs should pay the defendant a commission of 5% per cent., or any other commission, upon all or *853] any goods which the plaintiffs might thereafter supply in the way of their trade through the defendant's agency and upon

his introduction or otherwise; and that the defendant had been allowed to inspect and take extracts from all accounts entered in the plaintiffs' ledgers that would in any way assist him in proving his case; and that the accounts entered in such ledgers which the plaintiffs had refused to allow the defendant to inspect and take extracts from, related to matters in which the defendant had no interest, and as to which he had no right to inquire. The defendant is bound by the answer which the plaintiffs have given in their affidavit. This is the rule in equity, which, though it does not absolutely bind, will materially influence the judgment of this court. In *The Sheffield Canal Company v. The Sheffield and Rotherham Railway Company*, 1 Phill. R. 484, under the usual order for the production of books, &c., with liberty to seal up on affidavit such parts as did not relate to the matters in question, the defendants had produced a book with certain pages sealed up, and had made the required affidavit. The plaintiffs afterwards, on an affidavit of facts leading strongly to the inference that one of the pages sealed up did relate to the question in dispute, moved that the defendants might produce the book unsealed: but the motion was refused, although the defendants declined to answer the plaintiff's affidavit. In *Wigram on Discovery*, § 5, it is said: "The exercise of a jurisdiction of this nature cannot be otherwise than pregnant with danger to the interests of those against whom it may be enforced, unless careful provision were made for guarding against its abuse." In § 317, the learned author says: "The great difficulty which the court is sometimes under in refusing to make an order for the production of documents, arises from the consideration that it is *giving final effect to *^[854] the oath of the defendant (the interested party) upon the plaintiff's right to discovery,—a difficulty which is increased by the observation, that, from the nature of documentary evidence, the defendant may be swearing to that which is rather matter of law than of fact, or at least a mixed question of law and fact. The whole of the plaintiff's case may hinge upon a point like this. On the other hand, it must be observed, that, in refusing to make an order for the production of a document, a court of equity deprives the plaintiff of no evidence to which the law entitles him, and which he can obtain without the aid of a court of equity. A court of equity professes to do no more than add to that evidence which the plaintiff can obtain without its assistance such admissions as he may obtain by the examination of the defendant upon oath. Nor is this technical view of the case unsupported by more general reasoning. The bill may be filed, not to prove a case *known or even believed* to be true, but to elicit discovery for the *chance* of what may appear from the defendant's answer and an inspection of his papers. Now, it has been shown, that, in some cases, there is *no* form of pleading by which a defendant can by demurrer or plea protect himself from *all* discovery, however false the bill may be. The difficulty suggested is, therefore, strictly unavoidable. The oath of the defendant *must* be received or the defendant must be without the *means* of a defence which in truth belongs to him,—a proposition too absurd for argument." This principle is further exemplified by the case of *Adams v. Fisher*, 3 Mylne & Cr. 526, referred to in *Wigram*, § 153. There the plaintiff, as personal

representative of a deceased testator, stated by his bill that the defendant Fisher had acted as his solicitor, and had, in that character, received various sums of money on account of the testator's estate *855] for which he *had not accounted, and that he had in his possession books and papers relating to the testator's estate, and called for a schedule and production of such books and papers, and also prayed an account. The defendant admitted collecting the estate of the testator, and the possession of books and papers relating to the estate, and set out a schedule of them, but insisted that he was not the plaintiff's solicitor, but the solicitor of Fisher, who was the person employed by the plaintiff to collect the estate, and that he was accountable to Fisher only, and not to the plaintiff. Upon a motion for the production of the documents in the schedule, the Lord Chancellor (Lord Cottenham) refused the motion. In the course of the argument, he said,—“Suppose a bill is filed by a person claiming to be a creditor or legatee, or in any other assumed character, and the defendant denies that the plaintiff is what he is alleged to be, but states, on the contrary, that he is a perfect stranger, and denies, in short, everything on which the plaintiff proceeds, but, not having protected himself by plea, he is obliged to answer,—is the plaintiff, as a matter of course, to ask for all the documents in the possession of the defendant which relate to any of the matters introduced in the bill? I only want to know how far you carry the principle,—whether, as a mere matter of course, documents which, if the defendant's allegation is true, have nothing to do with proving the case made by the bill, are to be produced for the plaintiff's inspection. If a bill is filed by a person as a creditor, and he asks for all the title-deeds of the real estate, is the plaintiff entitled to see the title-deeds of a person's estate because he calls himself a creditor, which the defendant denies that he is?” And, in giving judgment, his Lordship says: “Here the defendant *has denied the plaintiff's interest*: he has on the record stated that *which, as it stands, in my opinion excludes *856] the plaintiff from instituting the suit against him. As long as that stands, I think the plaintiff is not entitled to see the documents.” [WILLIAMS, J.—Do you deny the right of the defendant to look at the ledger to ascertain (the thing being disputed) whether or not A. B.'s account began prior to 1853?] It is submitted that the defendant can have no right to inspect that which the plaintiffs aver on oath to be a thing in which the defendant has no interest and which cannot therefore form part of his case. The mischief done by granting inspection of that which the party is not entitled to inspect cannot be undone. There is every reason, therefore, why the answer of his opponent upon oath should bind him.

T. Salter, in support of his rule.—The plaintiffs have no right to decide by their oath that which is the issue for the jury.

ERLE, C. J.—I think the defendant is entitled to inspect all the accounts in which he is interested subsequently to 1852. The plaintiffs may seal up all that they pledge their oath that the defendant has no concern with.

The rest of the court concurring,

Rule absolute.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.

HENRY LORD BISHOP OF EXETER and J. H. COATES
BORWELL, Clerk, Plaintiffs in Error: PETER CHARLES
MARSHALL, Clerk, Defendant in Error. *June 26, 27, 1866.*
Feb. 21, 22; July 1, 2, 3, 4; Aug. 5, 1867. March 3, 1868.(a)

The Canons of 1603 have not been allowed and received so as to form part of the law of England, and bind the laity as well as clergy (*Middleton v. Crofts*, 2 Atk. 650, 2 Str. 1056, confirmed). But even if binding on the clergy,—then,

The 39th Canon of 1603 applies only to the institution of a presentee to a benefice.

The 48th Canon of 1603 does not apply to a presentee to a benefice, but does apply to a person seeking to be admitted as curate to an existing incumbent.

The right of a patron to present to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, and to reject him for sufficient ground.

A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop.

In *quære impedit*, upon a rejection of the patron's presentee, the bishop's plea must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manner as will enable the patron to take issue on the objection, and a proper tribunal to judge of its soundness.

An allegation in the plea that the bishop had good reason to believe that the presentee had been guilty of an attempt to commit simony is not sufficient:—

Seemeth, that a plea alleging presentation by the bishop as on a lapse must allege notice to the patron of the circumstances under which the bishop would so claim to present.

THIS was an appeal against a decision of the Court of Exchequer Chamber, which had confirmed a previous judgment of the Court of Common Pleas.

Mr. Marshall was the patron of the rectory of Tregony, in Cornwall, in the diocese of Exeter. He was also a clergyman, and had himself been the incumbent of that rectory, but resigned it on the 8d of August, 1857, and on the 9th of January, 1858, presented thereto John Reid, Clerk, a clergyman who had previously held a living in

(a) Law Rep. H. of L. (3 Eng. & Ir. App.) 17.

ever had any notice from the said bishop, nor ever, in fact, knew, before the collation of Mr. Borwell, that the said bishop would or did claim to collate any clerk to the said church; and except as aforesaid, the said bishop never, at any time before the said collation of Mr. Borwell, refused to admit, institute, and induct Mr. Reid as the plaintiff's clerk.

The plaintiff also demurred generally to the plea. The ground of demurrer was, that the facts set forth did not show any lapse entitling the bishop to collate. The defendants took issue on the first, and joined issue on the second replication, and they joined in the demurrer to the plea, and they also demurred to the replication. The ground of demurrer was, that the replication did not show that lapse had not duly occurred.

The court on the argument on the demurrer held the plea to be bad, and the replication to be good,^(a) and ordered that a writ to admit should issue, but execution of this judgment was stayed till after trial and the assessment of damages. The cause was tried at the Spring Assizes for Cornwall in 1860, before Mr. Baron Channell, when a special verdict was found, which set forth in substance that the Bishop of Exeter did not assign any other reason for not admitting the said John Reid than the alleged insufficiency of the paper, that a sufficient time had elapsed to enable Reid to obtain such farther sufficient testimony if he was bound and required by law to obtain the same. It then set out the whole of the correspondence between the parties, and found that the Bishop of Exeter did not give notice to Reid or the plaintiff that he required farther testimony to be produced within any fixed or specified time, and would not receive the same after six months from the avoidance of the living, nor give any notice relative to the said matters, and that they did not know that he would persist in requiring such farther testimony and would collate if it was not furnished. And the verdict found the Church to be of the value of 390*l.* a year.

Judgment was given for the plaintiff in November, 1860, and this judgment was affirmed on error. The case was then brought on error up to this House.^(b)

The judges were summoned, and on the first hearing Lord Chief Baron Pollock, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Baron Pigott, and Mr. Justice Smith attended. On the subsequent hearings, Sir Frederick Pollock having resigned his office of Lord Chief Baron, did not attend, nor did his successor, Sir Fitzroy Kelly, he having been previously one of the counsel for the Bishop of Exeter. The learned judges who attended the House were Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Baron Pigott, and Mr. Justice Lush.

The *Attorney-General* (*Sir Roundell Palmer*), and Mr. *Philpott*, for the Appellant.

It may be admitted that the canons of the Church are not, in the

(a) 7 C. B. N. S. 653 (E. C. L. R. vol. 97).

(b) The case was first argued in June, 1866, by the *Attorney-General* *Sir R. Palmer* (*Sir F. Kelly*, and Mr. *Philpott*, were then with him.) Shortly afterwards *Sir F. Kelly* was appointed Lord Chief Baron of the Court of Exchequer. The argument for the plaintiffs in error was renewed in February, 1867, by Mr. *Philpott*.

strict sense of the phrase, binding upon the laity, but they are binding upon the clergy. But this rule, to be deduced from the case of *Middleton v. Crofts*, 2 Atk. 650, 2 Str. 1056, is subject to this qualification, that, so far as the canons are parts of the ancient law of the church, that ancient law does bind the laity. In this way the canons now in question, being, in fact, declaratory of the old law of the church, as Lord Hardwicke in *Middleton v. Crofts* plainly supposed they might be, are binding on the laity.

The form of ordaining priests shows that examination of fitness was a necessary and strictly enforced preliminary to institution to a benefice. The bishop, after imposition of hands, uses the words, "Be thou a faithful dispenser of the Word of God;" and to no one, in whatever rank, can be intrusted the cure of souls unless the bishop is satisfied of his fitness to do the sacred work.^(a) This was fully discussed in *The Bishop of Down v. Miller*, 13 Ir. Jur. 197, where it was held that a bishop of one diocese might forbid a clergyman to preach in his diocese though duly licensed to another, and having the permission of the incumbent of the church where he proposed to preach.

Wherever there was cure of souls the bishop had a right to be satisfied of the fitness of the person presented, and if he came from a different diocese, the bishop had a right to require him to bring letters testimonial, and from the other bishop letters commendatory. In the case of institution, where cure of souls was necessarily connected with it, the bishop into whose diocese the presentee came, was bound as well as entitled to require letters testimonial, and commendatory.

It had been thought in the court below that the 48th Canon, which mentioned these letters, was applicable only to stipendiary curates, but that was an error. The word "*curatus*" applied to any person invested with the cure of souls: *Lyndwoode*.^(b) In that way it was applicable to a bishop himself: *Van Espen*.^(c) And the statute 2 Hen. 4, c. 15, speaks of "curates in their own churches," which shows that the word was then understood to include properly beneficed ministers, although, no doubt, the word might likewise be applied, as it is now, to ministers who were not beneficed.

The ancient law, as stated by *Lyndwoode*, is explicit as to the necessity for these letters commendatory. He says, *Tit. de Clericis Perigrinis*:^(d) "*Nullus alterius diocesis capellanus ad celebrationem admittatur sine diocesani sui literis, aut alterius episcopi, dummodo de ejus fide et moribus bona sit commendatio.*" And in a previous page^(e) he defined "*capellanus*" to mean "*sacerdos*," and commendatitial letters to mean letters which bore commendation or testimony of the honest life and good morals of the person to be ordained. In like manner he explains, "*Sui diocesani*" of the "*alterius capellanus*" thus: "*In cujus diocesi natus est, vel in cujus diocesi domicilium habet.*" There are many other passages to the same effect.^(g) And so there are in other collections of authorities, and by other writers on ecclesiastical

(a) Keble, *Liturgia*; Bp. Bur. *Sermons*, Oxf. Ed. 1862; Archbp. Potter's *Traacts on Church Government*, Ed. 1750, p. 462; *Hodges*. *Forms*.

(b) *Provinciale*, Ed. 1679, p. 238.

(d) *Prov.* p. 48.

(g) *Pages* 135, 139.

(c) Vol. i. p. 132.

(e) *Prov.* p. 47.

law: Peter de Murga; (a) Barbosa; (b) Beveridge. (c) The Council of Chalcedon, which declared the same rule, was one of the four general councils whose canons are recognised in the 1 Eliz. c. 1, s. 36. The same rule is to be found in the *Corpus Juris Canonici*, (d) and the *Decretals*, as collected by Raymundus, (e) express it in clear and plain terms. The statute 13 Edw. 1, c. 5, adopted in substance the declaration of the early councils as to the admission, after examination by the bishop, of a fit person to be instituted, and made the admission and institution conclusive against the patron for several reasons, the first of which is, as Lord Coke says, (g) because it is a judicial act of the bishop, and the right to examine is expressly declared to be in him. (h) The existence and authority of this law of the Church is affirmed in Gibson, (i) and the form of statement of the requisites for institution and induction described in the most authoritative books, shows that these letters testimonial were in every instance required. Bacon's *Liber Regis* (k) is distinct upon this point.

In Brookes's *Abridgment* (l) it is said that the Judges of the common law will take notice of what is the law of the Church, and that it need not be specially pleaded, for which are cited the Year Book, 9 Edw. 3, and other authorities. *Specot's Case*, 3 Leon. 198; 5 Co. Rep. 57, does not in the least degree affect this right and duty of the bishop. The decision there was adverse to the bishop, but it was not on the ground that he had no right to examine, and to reject on examination, but that in that instance he had pleaded that the man was an

(a) *Tract de Benef.* pp. 115, 275, 278.

(b) *De Off. et Potestate Episcopi* (Ed. 1698), p. 259.

(c) *Canones Cons. Chalced.* xiii., p. 129; and *Pandectæ Canonum*, 176; and *Cod. Can. Ecc.* 443.

(d) Chap. 6, 7, 8, 9.

(e) Ed. 1744, p. 283. There were also cited Bede's *Mon. Hist. Brit.* (published under the direction of the Master of the Rolls in 1848), p. 216; the decrees of the Council of Chalcedon, *Johns. Can.* 266; 1 *Wilk. Conc.* 145; 1 *Spel. Conc.* 292. [This appeared to be a British council, but it was said to be doubtful in what part of England it was held. Hollingshead and Spelman, 1 *Conc.* 313, speak of the place as in Merica. Sir Harris Nicolas, "*Chronology of History*," p. 226, gives it under the date 787, as a council held at Celchyth (or Cealchythe) in Northumberland.] *Canons of the Council of Hertford*, 1; 1 *Spel. Conc.* 152; The XVII *Can. of the 6th Gen. Council*, "*airs in Trullo*," The Council of Winchester, 2 *Spel. Conc.* 12;—of Exeter, 2 *Spel.* 350; The *Constitutions of Islip*, 2 *Spel. Conc.* 610; The *Canons of Reynolds*, 1322;—of Arundel, 1408; in *Lynd. Prov.* 47; *Apostolorum Canones*, 2; *Bibl. Voelli*, vol. ii., p. 787, 1414; 25 H. 8, c. 19; 35 H. 8, c. 16; *Rochus de Curte*, 37; *Dartis Op. Comm.* Ed. 1656, pp. 149, 150, 151; *Devotus Inst. Can. bk. iv.*, p. 189-191; *Di Murga Tract de Ben.* 278; *Giba. Codex* 806; *Jus. Can. Univ. bk. 1, tit. xxii.*, p. 211.

(g) 2 *Inst.* 357.

(h) 2 *Inst.* 631, 632.

(i) *Codex* 806.

(k) *Append.* p. 1281. For institution, the presentation, the orders of deacon and priest must be shown according to the 39th Canon; then "testimonials of his former good life and behaviour according to the 39th Canon, and if he come out of another diocese, then a testimonial from the bishop or ordinary of the place from which he comes."

These are under "Directions concerning the proper instruments to be brought to the bishop for obtaining orders, institutions, and licenses."

But see also the next page, "For a license to a curacy," the person coming to be licensed is to show the bishop the nomination by the incumbent; the letters of orders; letters testimonial from his college, or from the neighbouring clergy where he dwelt, and

"In case he comes from another diocese then to bring letters testimonial from the bishop or ordinary of the diocese or place from whence he comes, according to the 48th Canon, and the 8th Article of the archbishop's directions."

(l) *Quare Imp.* 12, p. 168.

"inveterate schismatic," which was held not to be intelligible. That decision was, therefore, nothing but a decision on a form of words in a plea to a *quare impedit*; and it has been questioned, in *The Bishop of Exeter v. Hele*, Show. P. C. 88, where a plea of *minus sufficiens in literaturâ*, without stating in what particular, was held good; and in *Rex v. The Archbishop of Canterbury*, 15 East 117, Lord Ellenborough made some unfavourable comments upon it. In the present case, the matter is of vital importance to the fitness of the presentee. The matter is one of strictly ecclesiastical cognisance. It does not raise any question as to the right of the patron, but applies essentially to the fitness of the presentee. The bishop had a right to require these letters commendatory, and to send back the presentee that he might procure them; if he did not procure them, the lapse occurred, and the bishop had a right to present. There was no need to allege, in the plea, a refusal to admit, and such an allegation would be contrary to the fact, for both sides agree that there was no refusal at all. The bishop sent away the presentee that he might bring a sufficient testimonial; he brought none at all, and so the lapse occurred. This was good, according to a case in the Year Books, 14 H. 7, H. T., pl. 4, fol. 21; 15 H. 7, E. T., pl. 2, fol. 6, where the bishop commanded the clerk to come again within three days; he did not come for six months, and the bishop collated as upon a lapse; and it was held good, though without notice to the patron. So in *Anonymous*, Dyer 277 (56), the general right of the bishop upon lapse was recognised. And in the case of a grammar school it was expressly held to be a good return to a mandamus commanding the bishop to grant a license for a grammar school, that he had suspended the granting of the license until the party would submit himself to be examined "touching his sufficiency in learning:" *Rex v. The Archbishop of York*, 6 T. R. 490. This shows that time itself may operate to create a lapse, and that no direct and positive act on the part of the bishop, such as an actual refusal to admit, is required for that purpose. The necessity and propriety of obeying the canons of 1603 in this respect is strongly asserted by Archbishop Sancroft.(a) Then are these canons to be applied to all ministers with the cure of souls, or are such persons to be admitted without testimonials.

The word "curate," says Burn,(b) "is a word of ambiguous signification; sometimes, and most properly, it denoteth the incumbent in general who hath the cure of souls," though, he adds, that it is frequently used to signify a clerk not instituted. The former and proper description would include rectors and vicars, and perpetual curates, who, in the absence of vicars, discharge the duty of the cure of souls for them, and have the same authority, and are therefore called *curati*. In the gloss on Islip's Constitutions,(c) curate is used in that sense, and *principalis curatus* is spoken of. The duty of residing on his cure is declared, and the whole passage shows that curate and incumbent were constantly treated as but one and the same spiritual person. So again, Stillingfleet, "Duties and Rights of Parochial Clergy,"(d) says: "The cure of souls is personally committed to

(a) D'Oyly's Life of Sancroft, Vol. i., p. 182; see also Cardwell's Documentary Annals, p. 342.

(b) Tit. Curates.

(c) Lyndw. 238.

(d) Pages 220, 221.

him that doth undertake it. And a regard is had to the qualification of the person for such a trust, by the patron that presents, and the bishop who admits and institutes the person so qualified. The old canons were very strict as to personal residence, so as to fix them in their cures. Our Saxon canons are clear as to the personal cure; and no presbyter could leave his cure and go to another only for honour or profit. And none could go from one bishop to another without his diocesan's leave. And when a bishop gives institution, he commits the cure of souls to the incumbent." A perpetual curate is a curate, yet he is also an incumbent: *Mason v. Lambert*,^(a) and he must satisfy the bishop on all these matters before he can claim to be admitted.

The jurisdiction of the spiritual Court in spiritual things was expressly admitted in *Cory v. Pepper*, 2 Lev. 222, where the force of the canons of the church was recognised, and it was only said that the spiritual Court must not proceed as upon the common law for a penalty, but might proceed on the law ecclesiastical. And if such is the law, and the bishop has the right and the duty to examine the presentee, he must be held entitled in the discharge of this duty to demand that "*congruum testimonium*" which the canon requires from a clerk who comes into a diocese where he was not ordained, and where he is, in fact, as many of the canons describe him, *ignotus*.

Sir *R. P. Collier*, Q. C., and Mr. *Coleridge*, Q. C. (Mr. *Bowen* was with them), for the defendant in error:—

The whole question here depends, in the first instance, on the sufficiency of the plea, and that question has been fully raised on the demurrer.

The rights of the patron are essentially involved in this case, and the presentation to the Bishop of Exeter of letters testimonial, or commendatory letters, from the Bishop of Manchester, was not a condition precedent to the institution of the presentee. Assuming, however, that such testimonials were necessary to be produced, sufficient testimonials were produced, and the mere declaration of the bishop that he did not consider them sufficient was not enough. It should have been distinctly stated in what respect they were insufficient in order that issue might be taken on the matter so as to be determined by a competent tribunal. There was no such statement of insufficiency in the plea, which was defective in that respect. Lastly, even if the testimonials were insufficient there was no allegation of notice to the patron that they were so, and that the bishop meant to insist on their insufficiency and would present as on a lapse. [Mr. *Philpott* stated that the bishop insisted that he was not bound to give notice, as might, by possibility, be required in an ordinary case, for that the patron here was himself a spiritual man and not a mere lay patron.]

Sir *R. P. Collier*, continued:—That made no difference. The right of presentation is a temporal right: *Godolphin*:^(b) and as to the exercise of it there is no distinction between lay and clerical patrons. The canon law is not binding on any patron unless where it is shown to have been adopted in this country, so as to become part of the

(a) *Cripps' Laws of the Church and Clergy*, p. 167.

(b) *Rept. Can. c. 3*, p. 34.

common law: *Middleton v. Crofts*, 2 Atk. 650, 2 Str. 1056; *Phillips v. Bury*, 1 Lord Raym. 5. But even by the canon law itself this plea would not afford a sufficient answer to the action. The Statute of Westminster 2 did not create the remedy by *quare impedit*, but only regulated its operation: *Coke's Institutes*. (a) *Caudrey's Case*, 5 Co. Rep. "Of the King's Ecc. Law" i., and *Articuli Cleri*, with *Coke's commentary* thereon, show how far the rights of the bishop extended in such a case. *Quare impedit* is a common-law action, and the bishop must plead such a plea as will be good at common law. There was a long struggle between the clergy and the laity on the subject of the authority of the Church, which *Selden* refers to, (b) and in the 51 Edw. 3 there is a statute passed which is thus stated in *Cotton's Tower Records*, p. 148: "The Commons pray that no order be made at the petition of the clergy without the assent of Parliament;" to which the answer of the King is, "Let this be more specially declared." There is no doubt that a bishop has the right and the duty to examine as to the idoneity of a presentee, but if he takes objections on a ground of ecclesiastical law, he must give notice to the patron, so that they may be tried by the archbishop; if on grounds of a temporal kind, he must state them, and the nature of them, so that they may be traversed, and be tried by a jury. In every case there is an appeal against the decision of the bishop. But among all the grounds of rejection of the presentee to a benefice, there is none founded on the non-production of letters testimonial. Such a person is not bound to produce them. That obligation may lie upon others, but it does not lie upon him. The plea here alleges what, if it could be supported, would amount in substance to this, that if the presentee was idoneous, and if the testimony to his character given by any number of clergymen was sufficient, still, if he did not bring from the bishop of the diocese whence he came letters commendatory to the bishop of the diocese where he was presented, the latter would have the right to reject him. There is no such law. If it existed, it would enable any bishop of one diocese to prevent a clergyman going into another diocese, and would enable the other bishop, from any motive of caprice, to refuse to receive him, and the patron and the presentee would alike be without a remedy. And the same would be the result if a clergyman had, for any cause however innocent, or even meritorious, been abroad for some years, and then came back to the diocese where he had been formerly ordained, but a new bishop was there who knew him not, and who might, therefore, decline to give him letters commendatory.

Even if the matter here suggested could, which it cannot, form an answer to the action of *quare impedit*, the plea is bad for not so alleging it that it may be traversed. The plea that no sufficient testimony was brought could not be put in issue so as to be tried before any spiritual or temporal court, and it is therefore bad: *Specot's Case*, 5 Co. Rep. 57. It is supposed that Lord Ellenborough, in *Rex v. The Archbishop of Canterbury*, 15 East 117, threw some doubt on *Specot's Case*, but that is a mistake. On the plea of *minus sufficiens in literaturâ* he showed that no trial before a jury would be satisfactory, and no doubt such a return must be tried by the archbishop, but he did

(a) 2 Inst. 361.

(b) Preface Hist. Tithes, p. 7.

not in the least degree impugn the doctrine that the bishop must show a good and a sufficient ground for rejection of a presentee, and that when it was a matter of fact it must be so set forth that it could be traversed and tried. And it was because *minus sufficiens in literaturâ* is a matter which can be tried by the archbishop that it was held sufficient in *Hele v. The Bishop of Exeter*, 3 Lev. 313.

Palmer v. The Bishop of Peterborough, 1 Leon. 230, is decisive as to the question here raised. It was there held that the bishop cannot refuse a clerk for want of letters commendatory. That is the only case in which this one ground of refusal was distinctly decided on, yet the cases affecting causes of refusal are very numerous. They are collected in *Viner*.(a) In *Palmer's* case the clerk did not show letters of ordination, nor did he bring letters commendatory. The bishop may have founded his refusal on both objections, but the refusal was held bad, and it is said in general terms that "the bishop cannot refuse a clerk for the want of letters testimonial." That case has never been impeached.

But supposing the Canons of 1603 to have a binding power in this case, then the bishop here has mistaken the canon which is applicable to it. He has proceeded on the 48th Canon, which really only refers to curates, whereas he ought to have proceeded on the 39th Canon, which applies to beneficed ministers. The 39th Canon does not warrant the demand of letters commendatory; and the 48th, which does require such letters, applies to curates only. But then it is said that the word "curates," applies to those who have the cure of souls, without reference to anything else, and is not restricted to the sense in which it is used at the present day. That argument is not founded in fact. The 13 Eliz. c. 20, s. 2, and the 14 Eliz. c. 11, s. 16, which relate to livings, make a marked distinction between beneficed clergymen and curates, and this distinction is recognised in *Watson's Clergyman's Law*, pp. 311, 312; *Burn's Ecclesiastical Law*, Tit. *Curates*; *Rex v. The Archbishop of Canterbury*, 15 East 117, 145; and *Gates v. Chambers*, 2 Add. Ecc. Rep. 177, 192.

The requirement to produce "*congruum testimonium*" is not intended to apply to a clerk who was to be instituted to a benefice. It was required only in the case of the non-beneficed clergy, now commonly described by the word "curates." Travelling clergy were not favourites in the Church in early times. At some periods the clergy appear almost to have been *adscripti glebæ*. In *Bingham's Origines*(b) it appears that even a bishop was hardly allowed to travel. [Lord WESTBURY:—What is the Latin word used there for travel?] *Peregrinare*: The wandering clergy were called *vacantivi*.(c) The

(a) *Abr. tit. Presentation, Z. A. Refusal.*

(b) 1 *Bingham's Origines*, bk. ii., c. 16, s. 19, p. 215. Bishops were not to travel without the letters of their metropolitan.

(c) 2 *Bingham's Origines*, bk. vi., c. 4, s. 5. "The laws were no less severe against all wandering clergymen, whom some of the ancients call *Baxarriſei*, or *vacantivi*, by way of reproach. They were a sort of idle persons who, having deserted the service of their own church, would fix in no other, but went roving from place to place as their fancy or their humour led them. Now, by the laws of the church, no bishop was to permit any such to officiate in his diocese, nor indeed, so much as to communicate in his church, and because, having neither letters dimissory, nor letters commendatory, from their own bishop (which every one ought to have that travelled) they were to be suspected either as deserters, or as persons guilty of some misdemeanour, who fled from ecclesiastical censure."

canons quoted on the other side apply to clerks moving from place to place, and were directed against wandering clergy, and not against a clerk who went from one see to another in order to be instituted into a particular benefice. The prohibitions to one bishop to ordain a person coming from another's diocese were numerous, but all these prohibitions related to the wandering clergy. All these canons were directed solely against persons who, to translate freely the words used in them, might be described as men who ran about.^(a) It is clear, upon examining the *Corpus Jures Canonici*, that letters commendatory were not in early times required upon institution to a benefice. The references to Barbosa, Ostiensis, and the Constitutions of the Council of Hertford,^(b) show that their provisions are all applicable, not to beneficed clerks, but to the wandering clergy, and to them alone.

The plea is bad for want of alleging notice. Ayliffe says^(c) that the bishop may not refuse institution on caprice, but for good grounds, and must give notice of the unfitness of the presentee that the patron may present another. Burn^(d) is to the same effect. It is clear that the law never intended that a bishop should, by his own conduct, make a lapse, which he could easily do if he chose simply to say that the testimony was not sufficient and that he required something more, and then, carrying on the same indefinite objection for six months, could claim at the end of that time to present as upon a lapse. Besides, here the plea does not allege a refusal to institute, so that on the face of the plea itself no lapse could occur.

The plea is bad for stating only that there was reason to believe that Reid had attempted to commit simony. It should have alleged, if it had been true, which it was not, that he had committed simony, and it should have set forth the averment of fact in such a way that it could be traversed and tried. [THE LORD CHANCELLOR.—The first instance of simony was only an attempt.]

The person now known as a perpetual curate holds a particular character, and is not to be likened to a curate. A perpetual curate resembles a beneficed clergyman, and an action may be maintained by his successor against him for dilapidations: *Mason v. Lambert*, 12 Q. B. 795; which certainly would not be the case with a curate. The distinction between them is manifest.

Sir *R. Palmer* replied.

THE LORD CHANCELLOR (Lord CHELMSFORD) proposed the following question to the Judges:—

"Whether upon the whole record the judgment ought to be entered for the plaintiff or the defendant?"

MR. JUSTICE BLACKBURN.—My Lords, I have the honour to deliver the joint opinion of my brothers Pigott and Lush, and myself.

In answer to your Lordships' question, we say that, in our opinion, the judgment on the whole record ought to be given for the plaintiff. Our reasons for this opinion are as follows:—

The right of the patron in an advowson is a temporal right of pro-

(a) *Decretals of Jur. III.*, bk. 3; *Institutione*, tit. 7, c. 5; *Corp. Jur. Can. Para. prim. Distinct* 71, 72, 98; *Lynd. De Cler. Peregr.* 47, 48, 49.

(b) 1 *Spel. Conc.* 152, A. D. 673.

(c) *Parergon* 299.

(d) *Tit. Benefice* 157.

perty, the exercise of which, however, necessarily affects the cure of souls. The clergy in early times wished to establish the doctrine, in favour of which, no doubt, a good deal may be urged, viz., that as the cure of souls was of the higher nature, and that, as the temporal right of the patron was but an incident to the institution to the cure of souls, which, according to their view, belonged exclusively to ecclesiastical cognisance, the jurisdiction as to the temporal rights of the patron was necessarily drawn into the spiritual court. But this doctrine was successfully resisted in England by the crown and the common lawyers; and since the statute of Westminster the 2d, chapter 5, at all events, if not before, there can be no doubt that the patron has the right to sue in *quare impedit* in the temporal court to enforce the institution of his presentee and the ouster of any clerk wrongfully instituted; and that the bishop must, if he defends the suit, by plea show the reason why he did not admit the clerk presented by the patron, and that of the sufficiency of this reason in point of law the temporal court is to judge.

There is no doubt that the law is that the patron can present no one who is not a fit person, and that the bishop is entitled to inquire whether the presentee is a fit person, and, if he is not, is bound to reject him. But in the plea in *quare impedit* it is not enough for the bishop to say that he *thought*, or even found, that the clerk presented was not a fit person; he must state positively that he was not a fit person, and must state in what respect he was not fit, with so much certainty and particularity as will enable the court to judge whether the objection is one which, if true in fact, renders him unfit, and will enable the patron to take issue upon it if he disputes the truth of the objection.

It is not material in the present case to inquire what degree of certainty or particularity in the plea was requisite; probably since the abolition of special demurrers that question will never again be raised. All that is important for the present case is to point out that the uniform course of pleading, from the earliest times, has been based on this,—that the finding of the bishop *never concludes the patron*, but that, whatever be the objection which the bishop thought fatal, it is examinable and traversable in the temporal court. This, we think has never been disputed, and it is not necessary to refer to any farther authority in support of it than the 2d Institute, p. 631.

Now in the present case the bishop, in the latter part of his plea, alleges that he had *good reason* for believing that the presentee had been guilty of an attempt to commit simony; but he does not say that the presentee *had* made that attempt, or that the bishop could prove it; and, though it might be not unreasonable if the law allowed the bishop to require that the clerk presented to him should be not only untainted with proved guilt, but also free from suspicion so serious as to affect his utility in his cure, yet it is clear that such is not the law of England; nor, on the argument at your Lordships' bar, was any reliance placed on this part of the plea.

The earlier part of the plea is what was relied upon, and it is material to see what is really alleged in it. It is pleaded that the clerk came from a foreign diocese, that of Manchester, and that he did not at any time bring with him a sufficient testimony from the bishop of

that diocese of his honest conversation, ability, and conformity to the ecclesiastical laws of England, or any such testimony "as he the said bishop was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the diocese from whence" the clerk came.

The plea does not say that the clerk was, on examination, found not fit, but that the bishop was not bound to, and did not, examine him at all, because, according to what he asserts is the ecclesiastical law of England, it was a condition precedent to his examination that the clerk should produce a testimony from the foreign bishop, and that this condition was never fulfilled. The question therefore is whether, by the ecclesiastical law of England, such a condition is imposed. If no such condition precedent is imposed by law the plea is clearly bad.

On the argument, both in the court below, and at your Lordships' bar, several of the Canons of 1603, and several much more ancient canons, were cited, which it was argued bore out this proposition. We do not think it necessary to enter into the inquiry whether these canons really, when fairly construed, bear the meaning put upon them by the counsel for the appellant, or not; for we are clearly of opinion that if the canons bear that construction they have never been received and allowed so as to be part of the ecclesiastical law of England.

The very able and elaborate judgment of Lord Hardwicke in *Middleton v. Crofts*, 2 Atk. 650, relieves us from the necessity of inquiring into the force of the Canons of 1603. These are prescriptions to the clergy, and are binding upon them in all matters which are within the scope of the visitatorial power of the Crown as head of the Church. It is not necessary in the present case to inquire how far that visitatorial power extends, or how far in matters ecclesiastical the clergy are bound by those canons. On this we express no opinion, and we only desire to guard ourselves against being supposed to express an opinion that Convocation, with the assent of the Crown, has a legislative power over the clergy similar to that of Parliament over all subjects. No such question arises here; for if the Canons of 1603 professed to impose a new condition on the right of a patron to present a clerk to a benefice, they did endeavour to affect a right of temporal property, and the judgment in *Middleton v. Crofts*, which has always been admired and never questioned, establishes that this was beyond their power. But though the Canons of 1603 could not, *proprio vigore*, impose that condition if new, yet, no doubt, they in many cases merely repeated the ancient law of England; and it was open to the counsel for the appellant to argue, as they did, that the ancient ecclesiastical law of England was to the same effect. But we do not think that they establish this merely by showing (supposing them to have done so) that the general canon law of Europe was to the effect for which they contend. It is stated by Tindal, C. J., in delivering the opinion of the Judges in *Reg. v. Millis*, 10 Cl. & F. 680, "that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law." For which position he gives reasons, for which we refer your Lordships to the report of the case.

In *Middleton v. Crofts* (already cited) Lord Hardwicke says: (a) "I have had occasion already to mention the rule laid down in *Caudrey's Case*, that such canons and constitutions ecclesiastical as *have been allowed by general custom and consent within the realm*, and are not contrary or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm as the King's ecclesiastical law of the same. This rule is warranted not only by the reason and nature of the thing, but also by a strong express declaration of Parliament in the preamble to statute 25 Hen. 8, c. 21, concerning Peter's pence and dispensations; and though in the proviso at the end of statute 25 Hen. 8, c. 19, for continuing the ancient canon law until the intended reformation thereof should be completed, no mention is made of custom or usage, yet there are words of the same import; and in the Act 35 Hen. 8, c. 16, for prolonging that power during the King's life, the proviso for continuing the ancient canons is repeated, and more clearly penned thus: 'Such canons, constitutions, &c., as be accustomed and used here.' Here," continues Lord Hardwicke, "rests the sure foundation of all ecclesiastical jurisdiction in this kingdom; and of this a rational and natural account is given in a manuscript treatise of that great and learned Judge Lord Chief Justice Hale, which I have perused. 'I conceive,' says he, 'that when Christianity was first introduced into this island, it came not in without some form of external ecclesiastical discipline or coercion, though at first it entered into the world without it; but that external discipline could not bind any man to submit to it, but either by force of the supreme civil power where the governors received it, or by the voluntary submission of the particular persons that did receive it. If the former, then it was the civil power of this kingdom which gave that form of ecclesiastical discipline its life; if the latter, it was but a voluntary pact or submission which could not give it power longer than the party submitting pleased, and than the King allowed, connived at, and not prohibited it, and thus by degrees,' says my author, 'introduced a custom, whereby it came equal to other customs or civil usages.' It remains then to be inquired (proceeds Lord Hardwicke) whether that part of the canon law which prohibits clandestine marriages (that being the subject then before the court) hath been received and allowed in England."

We think that these authorities are quite sufficient to justify our position, that it is not enough to show that such a condition precedent is imposed by the general canon law of Europe, or by the Canons of 1603; and we proceed to inquire whether such a condition has ever been received and allowed in England, so as to become part of the ecclesiastical law of the realm.

That is a question of law, and in investigating it we cannot do better than follow the example of Lord Hardwicke in *Middleton v. Crofts*, and, borrowing his words, endeavour "to proceed upon sure foundations, which are the general nature and fundamental principles of the constitution, Acts of Parliament, and the resolutions and judicial opinions in our books, and from these to draw our conclusions." He proceeds to say (what will be controverted by none) that no new

laws can be made but by the King, with the consent of both Houses of Parliament.

We think that the conclusion is irresistible, that unless this condition was made part of the law of England in the early times, when the law was being formed, it could not become so subsequently, except by statute. No such statute exists. That of the 36 Edw. 3, c. 8, which was referred to on the argument, was but a supplement to the Statutes of Labourers; and, just as those applied only to working men and not to the gentry, so did that statute apply only to chaplains who received wages, and not to the beneficed clergy; besides, that statute, after having long fallen into desuetude, was repealed by 21 Jac. 1, c. 28 (A. D. 1623).

If we come to the second head, the resolutions and judicial opinions in our books, we must observe that we know of no decision or judicial opinion that affords the least countenance to the supposition that such a condition ever was part of the law in this country. No such case was cited at your Lordships' Bar, and, considering the great learning and research of the appellants' counsel, we think we are warranted in assuming that none such exists. No statement of any text writer or work of authority was produced in favour of it, except one passage in Gibson's Codex, which we cannot think of any great weight as an authority on a question of law. Then, when we look at the analogy to the well-established principles of the law, we think that the argument is exceedingly strong that such a condition is inconsistent with, if not repugnant to, the common law.

The statute of Westminster was passed mainly to give patrons an effective remedy when the bishop had infringed the patron's right by instituting a clerk not presented by the patron. It has been followed by a long series of decisions, establishing that the bishop must, in order to defend himself in a *quare impedit*, allege that the clerk presented was in fact not fit, and that this is traversable. Even where the bishop knows of his own knowledge (or thinks that he knows, for it is to be remembered that he is fallible) that the clerk is *criminosus*, though he may refuse him on that ground, yet in his plea he must assert positively that he is *criminosus*, in order that issue may be taken thereon. The whole scheme of the law, in fact, is framed to secure that the patron may have the right in every case of having the bishop's conduct examined, and that his decision shall never conclude the temporal right. We think it repugnant to this that such a condition as is contended for should exist.

In the early times, when, if at all, this condition must have been introduced, the whole of Europe was of one communion, and if a priest was ordained at one of the foreign universities, the testimony of the bishop of the diocese in which that university lay would be as essential as that of an English bishop. Is it credible that, when the common lawyers and the legislature were so jealously guarding the rights of the patron against his own bishop, by providing that nothing he did should conclude the patron, but all be subject to review in the temporal Court, they should have left those rights completely at the mercy of the foreign bishop, who might not even be a subject of this realm, and whose refusal to grant a testimonial would be final?

It is clearly established that the bishop cannot defend himself by
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saying, "I believe the clerk to be unfit, and therefore I did not examine him;" but that to make a good plea he must say he was unfit, and that allegation is traversable. The contention on the part of the appellant is that he may plead that the foreign bishop does not even say he is unfit, but only does not choose to certify affirmatively that he is fit, and this is to be a good plea; though there is no power whatever to compel the foreign bishop to give such testimony, or to render his reasons for refusing it: it is no plea to say, "I think him bad," but it is a plea to say, "the foreign bishop don't choose to say he thinks him good." We think this is so repugnant to the whole policy of the law on this subject that it would require the strongest authority to establish such an anomaly, and, as we have already pointed out, there is absolutely no authority for it.

For these reasons we give our opinion that the plea is bad in substance, and, that being so, the special verdict ought to be found for the plaintiff, unless every part of the plea is proved, which is not the case.

If your Lordships should, contrary to the view we take of the case, think the plea good, it would become necessary to consider the validity of the replication, which, in the view we take of the plea, is immaterial.

MR. JUSTICE WILLES.—My Lords, in my opinion the plea is naught, and there ought to be a judgment for the patron; upon the simple and only ground that the right of a patron is to present any fit person, and that the plea does not state (as it ought, *Mallory, Qua. Imp.* 87 to 89) the person presented to have been in fact unfit, but only shows that a bishop was not so satisfied of his fitness as to give him a special testimonial, and that another bishop suspected him of simony.

The key to the right decision of this case is the elementary proposition, that a patron is entitled effectually to present any fit person, that is to say, a person of the canonical age, in orders (or, at least, who can obtain ordination before admittance), of sufficient learning, and against whose orthodoxy and morals no charge can be established.

The plea is, not that a fit person was not presented, but that the person presented was not certified to be fit by the bishop of the diocese in which he last had cure of souls. In other words, it professes to make the refusal of that bishop a conclusive bar, whether such refusal was founded upon judgment, prejudice, suspicion, or caprice; and whether, if founded in judgment, such judgment was erroneous or not.

It is now obvious to my mind—though I have thought over it till I doubted, and again till I returned to a clear conviction—that the veto of another bishop can, in reason and in law, only avail to the same extent and under the same circumstances as that of the bishop who is to admit; and therefore can be absolute only when the bishop has an absolute discretion, as in the case of stipendiary curates, and others having no benefice. To hold otherwise would be to abolish the remedy of the clerk and that of the patron in every case where the former comes from a foreign diocese.

The remedy of the clerk is by *duplex querela*, a remedy resorted to with effect in the memorable case of *Gorham v. Bishop of Exeter*, *Moore's Report of Gorham Case*. In that case, upon the presentation

of Mr. Gorham by the Lord Chancellor to a Crown living, the bishop, after questioning him for five days as to baptism and the necessity for preventive or prevenient grace to its sacramental efficacy, declined to testify or admit. That refusal was upheld in the Court of Arches upon a proceeding by *duplex querela*; but upon appeal to the Queen in Council the refusal of the bishop and the judgment of the Court of Arches were quashed. Bitter complaints were there made of the vagueness of the charges of heresy; and those complaints had judicial sanction. It is impossible to read the proceedings without being satisfied of the good sense of the decisions which require the bishop to show directly and specifically what the objection to the fitness of the presented clerk is, or without feeling that not one tittle of the law therein laid down ought to be stirred.

If this plea be valid, the only question to be tried upon *duplex querela* would be whether there was or was not a testimonial. In other words, the clerk would be at the mercy of the foreign bishop, and might be refused without cause and without appeal.

The remedy of the patron is by action at common law. To try what? Of course to try, first, whether the patron had the right to present; and, secondly, if so, whether he has presented a fit person. The former is not questioned. Who is to decide the latter? The answer is easy—the Court of common law. Therefore, a plea founded upon unfitness must, in the first instance, show an unfitness which the court can recognise as a disqualification, and not mere inconclusive evidence of unfitness. If the plea sufficiently shows unfitness, then its truth is to be tried either by a jury, if the cause be a crime, or by the certificate of the metropolitan if it be insufficiency: for which purpose the Court of common law, according as the case may be either summons a jury or sends a writ to the metropolitan, commanding him in the Queen's name to try the question, and to certify the result to the court. And that inquiry must take place according to legal rules of evidence; for, even in cases within the jurisdiction of the Ecclesiastical Courts, the Courts of common law restrain those courts by prohibition when they require evidence inconsistent with the common law, as, for instance, two witnesses to a payment.

Such being the course of proceeding in *quare impedit* (and surely a very reasonable and just one), leaving questions of law to the court of law, of criminating fact to the jury, and doctrine to the metropolitan, the plea seeks to make it a condition precedent to the jurisdiction of those constituted authorities, in every case in which the clerk comes from a foreign diocese, that he shall be able to procure (not that he shall deserve) the testimonial of the foreign diocesan. What is this but to say that the patron has not the right to present any fit person, but has only a right to present any fit person who may happen to reside in the diocese, or such a fit person happening to reside in another diocese as may be able to obtain a special testimonial of the diocesan?

What is the character of this testimonial? Is it a judgment as to the fitness of the clerk? Not so, for then it would equally bind the bishop, though he knew of his own knowledge that the clerk was unfit. But if it be not a judgment when given, how comes its refusal to be conclusive against the clerk? If he cannot obtain it by entreaty, has he a right to be heard, and how is he to enforce that right? Has

the patron any such right? Which metropolitan is to set the bishop right? And how can he be set right when he does not show the cause of his refusal? No solution was attempted of these difficulties; but it was broadly insisted that the law is such because the canon law is such, and that the canon law to this effect has been adopted into the law of England.

Upon these assertions, I observe simply that there is no proof of the adoption into the law of England of a canon repugnant to the right of the patron to present *any* fit person; and the canons, or rather the reading of the canons, upon which this plea is founded, are, or is, for the reasons stated, inconsistent with such right, and therefore no part of the law. No vestige of such law is found in our books except once in the Bishop of Peterborough's Case, where it was not acknowledged; and the statutes of Henry VIII. do not set up any canon not consistent with common law rights.

The ancient canons so much relied upon, sprang from a very different state of society, and seem to have been framed upon a notion of local allegiance that has small place in our system. They are, for instance, equally stringent upon bishops leaving their dioceses as upon clerks leaving their bishops. They seem to have originated in times when learning and clerks were scarce, and they are directed indifferently against all ecclesiastical persons who leave their proper flocks or shepherds, and wander into other pastures. The church was universal, but each particular diocese had a right to the services of its own clergy, who had not leave to depart therefrom. If those canons were now in force, it may be doubted whether any distinction could be made between the testimonial of the Patriarch of Constantinople or the Archbishop of Toledo and that of a prelate of the Church of England. Beyond doubt, none could consistently be made between Manchester, Jerusalem, and Capetown.

As time went on, and the canon law assumed its more complete form, provisions were made for the exercise of the *jus patronatus*; and they are to be found under distinct and independent heads in the same digest, with adaptations of the ancient canons as to clergy coming from foreign dioceses without call or provision. As I read them, the former made the right turn upon fitness, the condition throughout being that the person presented should be *persona idonea*, whilst the latter required the letters dimissory of the foreign bishop. Light is thrown upon this distinction by the elaborate provisions of the Council of Trent as to the *jus patronatus*, (a) by which, in case of presentation, a board of examiners decides upon the question of fitness; and those as to errant clergy, (b) which latter require consent or letters dimissory of the bishop. If it were essential to ascertain the exact construction of these ancient documents, I should have required more time to consider. It is enough, however, to say that there is no trace of the introduction of them into England as part of "the King's ecclesiastical law," to the prejudice of the right of the patron, and that their introduction to the extent or in the sense insisted on by the bishop would, as already shown, dook the patron's right.

As to the Canons of 1603, I agreed in, and adhered to, the con-

(a) Session xxiv. de Reformatione, c. xviii.

(b) Session xiv. de Reformatione, v. ii., et seq.

struction put upon them in the Court of Common Pleas, according to which the 39th is the canon applicable to this case; and that has been complied with. I collect from the report of the Gorham Case,^(a) that the Lord Chancellor, who (probably because his office has come down through ecclesiastics) seems to require the same testimonial as do the bishops, must have been advised that the 39th was the canon in point. Were, however, this construction of the canons erroneous, it could make no difference in my opinion, for it is clear that the Canons of 1603 do not, *proprio vigore*, bind the laity, nor the clergy as to their temporal possessions (Lord Hardwicke's judgment in *Middleton v. Crofts*, 2 Atk. 664), and an advowson is a temporal possession. As to how far, otherwise than in conscience, Canons of 1603, not declaratory of ancient canons adopted into the law of England before the records of Parliament, bind the clergy, I reserve my opinion.

One word in conclusion as to the deeply responsible position of the bishop, whose acts ought to be regarded, not only with deference, but with the strongest desire to uphold them so far as they can be reconciled with the law. Every one must sympathize with the condition of a conscientious prelate called upon to induct a person of indifferent character or qualifications, and unable to refuse such a candidate because he cannot lay his finger upon any specific act falling within the category of causes of deprivation; but the law requires him to give a decision open to appeal. Whether a change in the law, by which persons of whose worth there is a grave or just suspicion may be excluded, can be made consistently with the rights of patrons, is a question for higher minds. I can only declare my opinion as to the existing law to be, that the bishop is entitled to a reasonable time and opportunity to inquire of the fitness of the person presented; that he may endeavour to satisfy himself by all lawful means upon that point, and either admit or refuse; and that in case of refusal, or, what is equivalent to it, collating his own clerk, he must be prepared to state directly and specifically upon what ground, so that the justice of his refusal may be inquired into in due course of law. The ill opinion of himself or of another bishop will not suffice; suspicion will not suffice. The distinctions are not unfamiliar between *personam peccantem in conscientia populi, criminosam—suspectam de malo*. In this case, as in all others where a criminal offence is suggested as a disqualification, it must be distinctly alleged and proved; and if it be not sufficiently alleged, or if it be alleged and not proved, the presumption whereby every one is treated as innocent until he is shown to be guilty, must prevail.

With profound respect for the quarter whence this plea comes, and for the great learning and ability with which it has been maintained, I am satisfied that it is insupportable; and that (as the defence must stand or fall *secundum allegata et probata*) the judgment upon the whole record ought to be for the patron.

Since writing this opinion I have seen that prepared by my Brother Blackburn, which, so far as it goes, has my entire assent. Inasmuch, however, as what is above written treats the case in some respects differently, though with a like result, I venture, upon a question of

(a) By E. F. Moore, Esq.

so great importance, to submit to the House the considerations which have influenced my mind in my own words.

MR. BARON MARTIN.—My Lords, I also am of opinion that judgment ought to be entered for the plaintiff below, the defendant in error.

I have written a judgment upon the case; but as I entirely concur with those of my Brothers Willes and Blackburn, it would be an unnecessary occupation of your Lordships' time to deliver it.

It will suffice, therefore, to state that I am of opinion that the plea is bad in substance upon three plain grounds.

1st. Because the 48th Canon does not apply to institution to benefices at all.

This was the unanimous judgment of the Courts of Common Pleas and Exchequer Chamber, and their reasons seem to me conclusive.

2d. If it did, there is no authority whatever that the part of the 48th Canon, upon which the plea is framed, is or ever was adopted into the common law of England, by which alone the plea is to be judged.

3d. That the plea ought expressly to aver the reason of the unfitness of the clerk, so that your Lordships could judge of its sufficiency upon demurrer, and the patron could deny its truth, and that too whether the reason might be spiritual or temporal. If such was not the law, property in a lay advowson would be valueless.

I also myself think the plea bad for want of an averment of notice. In the part of the 2d Institute, which has been so frequently referred to, Lord Coke states when notice to the patron is necessary and when not. I think the present case falls within the reason of the instances when notice is necessary.

Upon these grounds I think this plea is bad, and they are all substantial grounds, and not at all of a formal and technical character.

If your Lordships agree with us, the judgment upon the whole record will lie for the defendant in error; but if you do not,—it will be necessary to consider as to the validity of the replication, and also what judgment ought to be given upon the special verdict.

LORD CHELMSFORD.—My Lords, I am of opinion that the judgment of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas in favour of the Defendant in error, ought to be affirmed.

The principal question raised by the demurrer to the plea of the Bishop of Exeter is, whether he had a right to require of the clerk presented to him by the patron of the living for admission, institution, and induction, testimony from the Bishop of Manchester of the clerk's honest conversation, ability, and conformity to the ecclesiastical laws, of the sufficiency of which testimony he (the Bishop of Exeter) was to be the sole judge.

In considering this question, it must be borne in mind that we are dealing with a temporal right of property. An advowson is by the law of England a lay inheritance. Its fruit or benefit is, that upon a vacancy of the living the owner possesses a right to present to the bishop a person in holy orders to be admitted and instituted. The only obligation which the law imposes upon him in the exercise of this right is that he should present a fit person. It is the duty of the

bishop to ascertain the fitness of the clerk presented to him. If the bishop refuses admission upon the ground that the presentee is not a fit person, the patron is entitled, under the statute of Westminster 2, c. 5, to sue in *Quare impedit* to compel the admission of his clerk, or to require the bishop, by plea to the action, to show the cause of his refusal, of the sufficiency of which plea the court is to judge.

That this is the regular course of proceeding appears from the following passage in 2d Institute, p. 681: "In a *quare impedit* brought against the bishop for refusal of the clerk, he must show the cause of his refusal specially and directly (for whether the cause be spiritual or temporal, the examination of the bishop concludes, not the plaintiff) to the intent the court may resolve whether the cause be just or no, or the party may deny the same; and then the court shall write to the metropolitan to certify the same; or if the cause be temporal, and sufficient in law (which the court must decide), the same may be traversed, and an issue thereupon joined," &c. From this passage it is clear that the judgment of the bishop, and his refusal to admit the clerk upon the ground of unfitness, is in no case final.

The plea of the bishop founds his rejection of the clerk upon the absence of a sufficient testimonial from the Bishop of Manchester; and in support of the plea it was contended by his counsel that such a testimonial, from a bishop, of a clerk coming from one diocese to another, has been an established principle of the Church from the earliest period. Authorities for this proposition were, with great learning and research, drawn by them from the decrees of councils, from ancient constitutions and canons of the Church, and from the works of eminent writers upon ecclesiastical law. And they relied also upon the 48th of the Canons of 1603, which canons they describe as embodying in them in many of their particulars the ancient law of the Church.

With respect to the reliance placed upon the law of the Church in support of the bishop's plea, it is sufficient to observe, in the words of Chief Justice Tindal, in the case of *Reg. v. Millis*, 10 Cl. & F. 680, "that it has long been settled and established law that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England." "Such canons and constitutions ecclesiastical, indeed, as have been allowed by general custom and consent within the realm, and are not contrary or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the King's prerogative, are" (as Lord Hardwicke said in *Middleton v. Crofts*) "still in force within this realm as the King's ecclesiastical law of the same."

Even then, if the ancient law of the Church gave such power to the bishop as is relied upon in the plea, as there is no proof that it was ever "allowed by general custom and consent within this realm," if such power exists some other ground of support must be sought for it.

This, it is said by the counsel for the bishop, is to be found in the 48th of the Canons of 1603.

According to the opinion of Lord Hardwicke in *Middleton v. Crofts*, these canons in general do not bind the laity *proprio vigore*, though some of them which are "declaratory of the ancient usage and law of the Church received and allowed here may, by virtue of

such allowance," be binding upon the laity. No such acceptance and allowance can be pleaded in favour of the right of the bishop to require the particular testimonial upon the non-production of which he refused to admit the plaintiff's presentee, even if the 48th Canon gave him such right, and applied to the case. However binding, therefore, this canon may be on the clerk presented for admission, I do not see how it can affect the temporal right of the patron to present a fit person to the bishop, and to question the bishop's power to impose any condition upon his admission except such as has been sanctioned by long-established usage, and is reasonably necessary to enable the bishop to judge of the fitness of the person presented.

The plea of the bishop states that the farther and sufficient testimony which he required from the clerk presented to him for admission was, "Testimony from the Bishop of Manchester of the presentee's honest conversation, ability, and conformity to the ecclesiastical laws of England." This testimony, in the case of curates and ministers removing from one diocese to another, must, by the 48th Canon, be obtained from the bishop of the diocese whence they came. But the canon does not apply to institutions to benefices, but only to the service of cures. This appears to me to be clearly shown by the preceding canons, 45, 46, and 47, which give an interpretation to the words "curates and ministers" in the 48th Canon.

The canon which really applies to the case of clerks presented to the bishop for admission is the 39th, which is headed "Cautions for institution of ministers into benefices," and which is in the following words: "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and, lastly, shall appear upon due examination to be worthy of his ministry." The "sufficient testimony" required by this canon has, by long-established practice, consisted of a testimonial by three beneficed clergymen, countersigned, if they are not beneficed in the bishop's diocese to whom the testimonial is given, by the bishop of the diocese in which the benefices are respectively situate, that the presentee has been personally known to them for three years last past; that they have had opportunities of observing his conduct; that during the whole of that time they verily believe that he lived piously, soberly, and honestly, and that they have not heard anything to the contrary thereof, nor that he has at any time held, written, or taught anything contrary to the doctrine or discipline of the Church; and that they believe him to be, as to his moral conduct, a person worthy to be admitted to the benefice. This "sufficient testimony," it is averred by the replication, was produced by the presentee of the plaintiff to the bishop. Neither the language of the canon, nor the established practice in the case of the admission to a benefice of a clerk coming from another diocese, sanctions the requisition of the bishop that he should bring with him the testimonial which is required by the 48th Canon of his honesty, ability, and conformity to the ecclesiastical laws.

The plea of the bishop not only alleges that he was entitled and bound, and ought, by the laws ecclesiastical of England, to require,

have, and receive such testimony from the bishop of the diocese whence the presented clerk had come, but also that it was for him to adjudge whether it was sufficient, and to require farther testimony, if he thought fit; and in the event of such farther testimony satisfactory to him not being produced after the lapse of six months from the avoidance of the living, to collate a clerk of his own, and all this without notice to the plaintiff, the owner of the advowson.

If this plea be good, it is immaterial that the clerk presented should be perfectly fit, of the lawful age, in holy orders, and his learning and morals beyond all exception, or that all the bishops in England, except the bishop of the diocese where he held cure of souls, should give testimony to his fitness; still, if the bishop of the diocese whence he came did not give such a testimony as the bishop of the diocese in which the benefice to which he is presented is situate adjudged sufficient, the owner of the advowson, after the lapse of six months, without any notice, would be deprived of his right of presentation. The patron would, under such circumstances, be at the mercy of the bishop, who capriciously, or, at all events, of his own mere authority and absolute will, might adjudge in his own mind that the testimony was not sufficient, without any appeal, or possibility of appeal, to a legal tribunal. This would be quite contrary to the right of the patron to challenge the rejection of his presentee, and to enforce his right of presentation by *quare impedit*, "unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit" (*per* Lord Ellenborough, *Rex v. Archbishop of Canterbury*, 15 East 117). The cause shown by the bishop in his plea must be one upon the sufficiency of which, in point of law, the court may decide, or which may be traversed and issue joined upon it, to be tried, if the cause be spiritual, by the certificate of the archbishop, and if temporal, by a jury.

But the cause of refusal to admit the plaintiff's presentee, which is averred in the plea, takes away from the court all power of judgment in the matter. It asserts a right in the bishop finally to decide upon the rejection of the presentee, without assigning any reason, and consequently without any possibility of appeal from his decision. This is utterly repugnant to reason, and to the authorities which have decided that the patron may protect his temporal right of presentation by calling upon the bishop to show, by plea to a *quare impedit*, such a cause for his refusal to admit the presentee as a court of law may inquire into and determine upon as to its sufficiency.

I think the plea is also objectionable for want of an averment of notice to the plaintiff that the clerk had not, in the judgment of the bishop, produced to him sufficient testimony of fitness to be admitted. The right of presentation to a living is (as has been already stated) a mere temporal right. If the patron presents a fit person, who produces all the proofs of his fitness which the bishop can rightfully require, it is the right of the patron to have his clerk admitted. If, for any reason determined upon by the bishop, the clerk should prove unfit, the patron is clearly entitled to notice, as he might acquiesce in the bishop's judgment, and present another person to him for admission. It would be unjust and unreasonable that the bishop should be at liberty to wait the lapse of six months without any notice to the

patron, and then, acting upon his own secret judgment, collate his own clerk to the living.

For these reasons I think that the judgment of the Court of Exchequer Chamber is right and ought to be affirmed.

LORD CRANWORTH.—My Lords, the opinions that were given in your Lordships' House by the learned Judges seem to me entirely to exhaust this subject. The case turns entirely upon the sufficiency of the plea of the Bishop of Exeter in a proceeding of *quare impedit*, with reference to the living of Tregony, in the county of Cornwall. The plea of the bishop, after stating that the church is in his diocese, and that he only claims as bishop, goes on to state that the plaintiff, after vacancy, presented John Reid as his clerk; that Reid had not been ordained by him as Bishop of Exeter; that Reid came from a foreign diocese, viz., the diocese of Manchester, in which he had then lately held a benefice with cure of souls; and that Reid did not produce from the bishop of the diocese from which he came any sufficient testimony according to the ecclesiastical laws of England of his honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as the bishop ought to require and have from the bishop from whose diocese he came; that Reid brought testimony from the Bishop of Manchester which he (the Bishop of Exeter) held not to be, and which was not, sufficient testimony, according to the ecclesiastical laws of England, of Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as a bishop ought to receive according to law; and that the bishop informed Reid that it was not sufficient, and that the bishop required farther testimony. These are the averments of the plea. It goes on to state that Reid departed and never returned, and farther testimony was not produced, though sufficient time was allowed. Then it goes on, by way of addition, that before the collation after mentioned in the plea, the bishop received from the Bishop of Manchester farther testimony, from which he had reason to believe, and did believe, that Reid, while beneficed in the diocese of Manchester, had been guilty of an attempt to commit simony, by soliciting one Francis M. Knollis to enter into a simoniacal contract touching another benefice then held by Reid, and that he was not a person of honest conversation, &c., all which was known to Reid. Wherefore, after a lapse of six months, the bishop says he presented Borwell.

Now the question is, whether that is a valid plea. Whether it affords a good answer to the complaint of Marshall, that the bishop has refused to institute his clerk whom he presented. The Judges unanimously say that that is a bad plea; and I am clearly of opinion that the Judges are right.

Mr. Justice Willes says: "The key to the right decision of this case is the elementary proposition, that a patron is entitled effectually to present any fit person—that is to say, a person of the canonical age, in orders (or, at least, who can obtain ordination before admittance), of sufficient learning, and against whose orthodoxy and morals no charge can be established." No one can question this as being a true exposition of the law, and it follows, as a corollary, that a bishop refusing, on vacancy of a benefice, to institute a clerk duly presented by the proper patron, must state that the presentee is not a fit person

to be instituted, and must aver directly why he is unfit: that is, he must aver some ground of objection, depending either on matter of fact or matter of law, in order that, in the one case, the validity of the objection may be tried by a jury, and, in the other, may be decided by the Court. Here no such objection is stated. It is merely stated that the Bishop of Manchester did not furnish a testimonial which the Bishop of Exeter says, according to the ecclesiastical law of England, he was entitled to require. Whether he was so entitled to require, is the question to be determined. Now, a clerk in such case has no means whatever of compelling the bishop from whose diocese he comes to give him a testimonial. It is consistent with the plea that Reid is a perfectly learned, pious, and orthodox clerk; but yet, if the plea is good, he has no means of obtaining institution, and the patron is deprived of his temporal right. The learned Judges have so entirely exhausted the case, that I do not think I should be usefully occupying your Lordships' time if I did more than say that I entirely concur, not only in the result at which they have arrived, but in the grounds upon which they found their judgment.

LORD WESTBURY.—My Lords, an advowson, or right of patronage to a living with cure of souls, is, according to our law, a lay fee or temporal inheritance, and its ownership and mode of enjoyment are determined by the common law. Ecclesiastical law has no farther room for interference than this, that the owner of the advowson is bound to present a clerk fit in doctrine, learning, and morals; and that, if the clerk be unfit, the bishop may object to institute him. But if the bishop refuses to institute, he is bound by law to state his objection in a precise and definite manner, so that the patron may be able to have the validity or truth of the objection tried by law; that is, by the common law courts, if it be an objection founded on immorality, and by the metropolitan if the objection be for error in doctrine or insufficiency of learning. The present case depends on the sufficiency of the ground of refusal as set forth in the plea.

It is obvious that of the sufficiency of the presentee in point of learning and doctrine the bishop may satisfy himself by personal examination, but on the point of moral conduct the bishop must depend upon external evidence. On the inquiry, therefore, as to the fitness of the clerk in point of morals, it seems necessary that he should bring to the bishop some testimony or certificate touching the honest conversation of his antecedent life. And the question then arises, whether the law requires for this purpose any precise or defined form of testimonial.

The bishop contends at the bar that by the immemorial law of the Church, in cases where the presentee has previously had cure of souls in another diocese, it is incumbent on him to bring letters of testimonial from the bishop of that diocese; and his counsel cited, with much diligence and learning, many books, and authors who have written on the canon law, for the purpose of proving that this was the established rule and usage of the Church previously to the Reformation.

If it had been pleaded and proved that this alleged old rule and usage had been received, observed, and acted upon in the Church of England since the Reformation, it is possible that it might have been shown that this particular kind of testimonial was, by law, an essen-

tial criterion of the moral idoneity of the clerk, but this is not the case actually raised by the plea; and it may be matter of regret that from the defects of the pleading the real defence, probably, has not been raised. The plea does not distinctly state that by ecclesiastical law, as received and prevailing by general consent and custom throughout the realm, and therefore part of the common law, the certificate of the former bishop is a necessary condition of the fitness of the clerk; nor does it aver that it has been the invariable practice and usage of the Church, and of the Anglican Church in particular, for the bishop to whom the clerk is presented to require and receive from the former bishop such a testimonial. In fact, there is no statement of the usage or practice of bishops in this respect, but simply an averment that the clerk did not at any time bring with him a sufficient testimony from the bishop of the former diocese, or any such testimony, as he, the Bishop of Exeter, was bound and ought by the laws ecclesiastical of England to require, have, and receive from the bishop of the diocese whence the clerk came.

In consequence of the want of such a testimonial, the bishop declined to make any inquiry into the moral fitness of the clerk, or to receive the testimony of any other persons, but peremptorily rejected the presentee.

To justify this refusal the bishop appeals to the laws ecclesiastical. It is incumbent on him to show either some written law binding the clergy, or a general usage, which may be taken as evidence of law from which the legality of imposing such a condition is shown, or may be inferred. No decided case, or writer of authority, has been cited for the purpose of showing that such a condition has been recognised in any of our courts of justice. Whatever, therefore, may have been the canon law prior to the Reformation in this respect, there is nothing to show that it became part of the common law of this realm.

The question remains whether the case of the bishop can be supported by the Canons of 1603, and particularly by the 39th and 48th of those canons, or either of them. It is true that the Canons of 1603 do not bind the laity nor the clergy as to temporalities: but they will be authority if they lay down any rule as to the fitness of clerks presented by lay proprietors of advowsons, inasmuch as the idoneity of the clerk and the mode of examining into it by the bishop fall properly within the scope of ecclesiastical law.

The bishop appeals particularly to the language of the 48th Canon, the words of which are set forth in his plea, and he contends that the word "curate" is to be taken in the largest sense, so as to include clerks presented for institution to benefices. But it is not possible to adopt this construction when attention is given to the preceding 39th canon, which is expressly entitled "Cautions for Institution of Ministers into Benefices." And as the directions in the 39th Canon differ in some important particulars from the directions in the 48th, it is not to be supposed that two inconsistent sets of rules were intended to be laid down touching the institution of clerks. The class of persons intended to be designated by the words "curates" and "ministers," seem to be unbeneficed clerks who were employed to perform spiritual duties in the benefices of others, with the sanction of the ordinary, and who might properly be required to bring letters dimissory from

the bishop of the diocese where they had been previously employed.

The 39th Canon, therefore, in the absence of the plea and proof of uniform usage, and of any other judicial authority, is the only evidence of the law ecclesiastical on the subject of this plea. And it is clear that it by no means warrants the position, that the bishop is entitled to require the testimonial of the former bishop as a precedent condition to his institution of the presentee.

The rule contended for by the Bishop of Exeter would certainly open the door to very arbitrary and capricious proceedings, rendering the title of the clerk and the right of the patron entirely dependent on the will of the prior bishop. Such a conclusion is at variance with reason, and therefore repugnant to what is called "the policy of the law." At the same time, if such a rule had been pleaded by the bishop to have been the invariable usage of the Church from the earliest times down to the Reformation (which would be evidence of its being a law of the Church), and that it had been continued and uniformly recognised and acted upon by the bishops of the Anglican Church since the Reformation (which might have shown it to have been received and adopted as part of the law ecclesiastical recognised by the common law), the fitness of the rule ought not to be questioned. Nothing of this kind has been proved, nor could it be averred, consistently with the language of the 39th Canon, which requires only that the presentee shall bring a sufficient testimony of his former good life and behaviour, if the bishop shall require it—a rule which enables him to obtain sufficient testimony from any competent quarter, without confining him to the sole discretion and opinion of the former bishop.

For these reasons, I am of opinion that the judgment of the court below ought to be affirmed.

Judgment of Exchequer Chamber affirmed.

Lords' Journals, March 30, 1868.

Attorney for plaintiff in error: *George E. Philbrick.*

Attorney for defendant in error: *Compton Reade.*

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TO

THE PRINCIPAL MATTERS.

Gillispie

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Suit for Collision.

1. To constitute a good plea of *res judicata*, it must be shown that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second. *Nelson v. Couch*, 99.

2. Where, therefore, the plaintiffs had under a decree of the Admiralty Court in a suit for a collision obtained the whole proceeds of the sale of the defendants' vessel,—Held, that such recovery was no bar to a subsequent action in a court of common law, the amount so recovered in the Admiralty Court being insufficient to cover the damage the plaintiffs had sustained. *Ib.*

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The court will not allow an amendment so as to introduce a new cause of action, where a cause has been referred by consent under an order which does not reserve power to the arbitrator to amend. Nor will they permit the plaintiff to revoke the submission, —there being no suggestion of any breach of faith on the part of the defendants. *Smurthwaite v. Richardson*, 463.

APPEAL.

Bail on.

1. The court or a judge has a discretion to dispense with bail on appeal, as well as with bail in error. *Besan v. Whitmore*, 443.

2. An official assignee of a district court of bankruptcy having been sued by the trade-assignee for contribution to the costs of an unsuccessful action to which the former was an assenting party, and judgment having gone against him,—Held, that it was a fit case for dispensing with bail on appeal. *Ib.*

ARBITRAMENT.

Appointment of arbitrator, and waiver of irregularity.

1. A party who attends before an arbitrator, though under protest, cross-examines his adversary's witnesses, and calls witnesses on his own behalf, thereby waives all objections to the proceedings which do not go to the competency of the tribunal. *Ringland v. Lowndes*, 173.

2. Under the Public Health Act (11 & 12 Vict. c. 63), where a disputed claim to compensation is to be settled by arbitration, the award is, by s. 124, to be made "within twenty-one days after the appointment of the arbitrator, or within such extended time, if any, as shall have been duly appointed by him for that purpose." By s. 125 it is provided, that, in case the arbitrators neglect or refuse to appoint an umpire for *seven days* after being requested so to do by any party, the sessions shall, on the application of such party, appoint an umpire. And by s. 126 it is further provided that the time for making an award under the act shall not be extended beyond the period of three months from the date of the submission or *from the day on which the umpire shall have been appointed*, as the case may be. In 1856, the plaintiff sustained damage from the construction of works by a local board, and in 1858 made a claim for compensation. He afterwards obtained a rule for a mandamus commanding the board to make compensation. Arbitrators were afterwards (in January, 1861) appointed to assess the amount, under s. 123. These having refused to appoint an umpire, the plaintiff applied to the Easter sessions to appoint one, but failed in consequence of the want of a notice of his intention to make such application. The required notice having been given, a second application was made at the Midsummer sessions, and one J. was named as umpire, but, as his consent had not been obtained, no formal appointment was then made. A third application was made at the Michaelmas sessions, and J. was on the 14th of October appointed umpire, and accepted the appointment. On the 13th of November, the umpire (not having enlarged the time for making his award) appointed the 29th for entering upon the arbitration. The counsel for the board, being informed of this objection, *protested against the umpire's going on with the reference*, but still attended, cross-examined the plaintiff's witnesses, and called witnesses for the board; and at the close of the business intimated to the umpire that the board would rely upon their protest in case the award should be against them. The umpire made his award in favour of the plaintiff on the 30th of December. In an action upon the award,—Held,—1. That the appointment of the umpire in reality took place at the Michaelmas sessions, and was in time, and consequently the award was duly made within three months from the umpire's appointment. *Id.* [Sub judice.]

3. Although the umpire had failed to comply with the requirement of the 124th and 126th sections of the act by enlarging the time for making his award within twenty-one days of his appointment, that defect was cured by the attendance of the board and their taking part in the subsequent proceedings. *Id.*

Mandamus to enforce.

4. Held, that the plaintiff was entitled to a mandamus (under the Common Law Procedure Act, 1854), commanding the board to make and levy a rate to satisfy the amount of the award and the costs of the reference, although the six months limited by the 89th section of the Public Health Act for the making of retrospective rates had elapsed since the damage was done,—the action having been commenced within six months after the making of the award, and it not appearing that the plaintiff had been guilty of any laches; and that it was no answer to the claim for a mandamus, that by possibility the board might have funds enough in hand to satisfy the demand, without making a fresh rate. *Id.*

Making submission a rule of court.

5. Upon a submission to arbitration between two individuals (not being partners in trade) and a third party, where the agreement of reference is signed by one of them thus,—*"A. for self and B.,"*—on making the submission a rule of court, it must be shown by affidavit that A. had the authority of B. to sign for him. *Re Aldington and Cheshire*, 375.

ARRANGEMENT.

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BANKRUPT,

Second bankruptcy.

1. A second fiat against a trader who has not obtained his certificate under the first, is not void. Therefore, the assignees under the second fiat may maintain an action against a third person for the conversion of property acquired by the bankrupt after the date of the first fiat,—the assignees under the first fiat not intervening. *Morgan v. Knight*, 669.

Execution against goods of bankrupt after discharge, for costs of a verdict obtained before the bankruptcy.

2. The defendants obtained a verdict in July, 1862. In September, the plaintiff filed a petition in bankruptcy, and in November he was adjudged entitled to his discharge, but the formal order was not drawn up until the 18th of August, 1863. In November, 1862, the plaintiff made an unsuccessful motion for a rule to enter the verdict for him. There being a demurrer upon the record which was undisposed of, the defendants did not sign final judgment and tax their costs until the 10th of August, 1863; and in December they issued a *f. fa.*, under which certain (after-acquired) goods of the plaintiff were seized:—Held, that the costs were not a debt or a contingent liability provable at the time of the bankruptcy, and consequently that the execution was regular. *Oxley v. The North Eastern Railway Company*, 695.

Liability of official assignee to contribute to expenses of an action.

3. An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade-assignee for the recovery of part of the bankrupt's estate, and the action proving unsuccessful, the trade-assignee paid the costs:—Held, that he was entitled to sue the official assignee for contribution. *Bevan v. Whitmore*, 433.

Deeds of arrangement under 24 & 25 Vict. c. 134, s. 192.

4. A certificate of registration of a deed of arrangement, under the 198th section of the Bankruptcy Act, 1861, is no answer to an action by a non-assenting-creditor, if the deed contains covenants which are unreasonable or contrary to the general scope and policy of the bankrupt laws. *Leigh v. Pendlebury*, 815.

5. Thus, a stipulation that creditors shall verify their debts by solemn declaration or otherwise to the satisfaction of the trustee, renders the deed void: so, a covenant not to sue, under penalty of forfeiting the debt: so, a covenant that the trustee may [shall?] pay in full all creditors whose debts shall not amount to 10*l.*: so, a covenant that the decision of a majority of the executing creditors to discharge the trustee from the trusts of the deed shall bind all the rest of the creditors. *Id.*

6. *Seem*, that a certificate of resignation under s. 198, by a person professing to be "acting for" the chief registrar in bankruptcy, is a sufficient certificate. *Id.*

Set-off of unliquidated damages.

7. In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt,—the court allowed the defendant to plead an equitable plea of set-off for unliquidated damages arising out of the same contract. *Makesham v. Crow*, 847.

BANKSMAN.—See **COAL-MINES**.

BARNLEY MARKET.—See **MARKET**, 1.

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CAB-PROPRIETOR.

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CANAL ACT.

Compensation for damage to lands, &c.

By a canal act commissioners were appointed for "settling, determining, and adjusting" all questions, matters, and differences between the company and the owners of lands, &c., prejudiced by the execution of any of the powers thereby granted: and by a subsequent section the amount of compensation was to be assessed by a jury, and the commissioners were to give judgment for the sum so assessed, which was to be "binding and conclusive to all intents and purposes:—Held, that the verdict and judgment were conclusive as to the amount, but not as to the claimant's right to compensation. *Barber v. The Nottingham and Grantham Railway and Canal Company*, 736.

[CANON.]

1. The Canons of 1603 have not been allowed and received so as to form part of the law of England, and bind the laity as well as clergy (*Middleton v. Crofts*, 3 A. & C. 66, 2 Str. 1056, confirmed). But even if binding on the clergy,—then,

The 30th Canon of 1603 applies only to the institution of a presbyter to a benefice. *Bishop of Exeter v. Marshall* (H. of L.), 507.

2. The 48th Canon of 1603 does not apply to a presbyter to a benefice, but does apply to a person seeking to be admitted as curate to an existing incumbent. *Id.*

CARRIER.—See **RAILWAY COMPANY**, 1.

CERTIFICATE.

Under the Bankruptcy Act, 1881, 24 & 25 Vict. c. 134, s. 195.—See **BANKRUPT**, 4, 6.

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CHARTER-PARTY.

Construction of.—See **CHARTER-PARTY**, 4.

CHIEF REGISTRAR IN BANKRUPTCY.—See **BANKRUPT**, 6.

[CLERGY.]

A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop. *Bishop of Exeter v. Marshall* (H. of L.), 507.]

COAL-MINES.

Inspection and regulation of.

By a special rule for the regulation of collieries under the 26 & 27 Vict. c. 103, the banksman is directed to "take care that the persons descending or ascending the pit shall in no case exceed the number of eight men and boys." A breach of these rules is by a 73 punishable on summary conviction by fine and imprisonment. *Id.*, the charter-master of a pit (who by the rules is declared to be "the responsible manager of the pit under his charge"), was shown to the pit and was cognizant that more than eight men were being lowered down at one time, and had power to prevent the banksman (who is the servant, from so doing, and did not interfere.—*Held*, that *id.* was property entitled of a breach of the regulations, as being a person "aiding, abetting, or procuring the commission of the offence," within the 12 & 13 Vict. c. 48, s. 2. *Newell*, app., Wyman, resp., 51 N.

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Sec. 151. Bail in error.—See **APPEAL**.

Sec. 222. Amendment.—See **AMENDMENT**.

COMMON LAW PROCEDURE ACT, 1854.

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CONTRACT.

Construction of.

1. A. agreed with B., that B. might dig and carry away cinders from a certain chert.

CONTRACT.

Construction of (continued).

tip, the property of A., B. paying A. a certain price per ton:—Held, that this agreement need not be by deed. *Smart v. Jones*, 717.

Rescission of.

2. The plaintiffs and defendant entered into a treaty for the sale and purchase of a large quantity of furniture, to be paid for half in cash and the residue by bill at six months. A portion of the goods having been delivered the parties disagreed, and the defendant wrote to the plaintiffs as follows:—"The way you do your business will not suit me. I have an account for a large amount of goods not purchased, and a demand made for payment opposed to treaty. I now show all further orders, and desire what I have not purchased may be taken off my hands."—Held, that the plaintiffs were entitled to treat this letter as a rescission of the contract, and to sue at once upon a quantum valebant for the goods delivered and kept. *Bartholomew v. Markwick*, 711.

CONDITIONS.—See RAILWAY COMPANY, 1.

CONVERSION.

What amounts to.

1. A. deposited a dock-warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock-warrant, and C. took actual possession of the brandies on the 30th:—Held, that the sale on the 28th, and the delivery of the dock-warrant to the vendee on the 29th,—A. having the whole of that day to redeem it,—amounted to a conversion. *Johnson v. Stear*, 380.

2. And held by Erie, C. J., Byles, J., and Keating, J., that the proper measure of damages was the actual damage A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal. *Ib.*

3. But by Williams, J., that the proper measure of damages was the value of the thing converted,—the bailment having been terminated by the wrongful sale. *Ib.*

4. Where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day,—*Scruble* that such a power of sale is implied by law from the nature of the transaction. *Pigott v. Cubley*, 701.

5. But, where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties,—it is not competent to the pawnee to sell without a proper demand and notice. *Ib.*

6. A notice that he will sell unless an excessive sum be paid immediately, is not such a notice as will justify the sale. *Ib.*

And see BANKRUPT, 1.

COSTS.

Taxation of.

1. Article 7 of the Directions to the Taxing Masters, of Hilary Term, 1853, applies to the costs of a defendant who obtains a verdict in a cause tried before the Secondary, where the sum endorsed on the writ does not exceed 20*l.* *Copley v. Hamingway*, 447.

Of witnesses whose testimony not acted upon.

2. The declaration contained three breaches,—1. for arrears of sleeping rent due upon a mining lease,—2. for not keeping the mine in repair,—3. for not properly working. The defendant suffered judgment by default; and, upon the execution of a writ of inquiry, the jury gave the plaintiffs 50*l.* damages on the first breach, but refused to find any damages on the second and third breaches:—Held that the plaintiffs were nevertheless entitled to the expenses of witnesses called to prove these breaches, whom the Master in the exercise of his discretion thought material and necessary,—the plaintiffs being entitled as matter of law to nominal damages on these breaches. *Dods v. Jones*, 681.

Under 15 & 16 Vict. c. 54, s. 4.

3. Where one of two plaintiffs resides within and the other without the distance of twenty miles from the defendant, and the sum recovered is under 20*l.* in contract, and 5*l.* in tort, the case is one of concurrent jurisdiction within the 138th section of the 9 & 10 Vict. c. 95. *Bennett v. Benben*, 515.

4. Upon a motion for costs under the 15 & 16 Vict. c. 54, s. 4, after an unsuccessful application to a judge at Chambers, the plaintiff must bring before the court all relevant materials which were used before the judge. *Ib.*

5. In an action for breaking and entering the plaintiff's shop and dwelling-house, with a count for assaulting the plaintiff's wife, the defendant pleaded not guilty and several

COSTS (continued).

pleas of justification to each count, and the plaintiff, as to the assault upon the wife, new-assigned excess. At the trial the plaintiff obtained a verdict for 40s. for the excess in the assault. The judge afterwards made an order for costs under the 15 & 16 Vict. c. 54, s. 4, on the ground that the cause of action was one for which a plaintiff could not have been entered in the county court,—the title to land coming in question. The court set aside the order. *Blackmore v. Higgs*, 790.

COUNTY COURT.*Concurrent jurisdiction.*

One of two plaintiffs within the jurisdiction of the county court.—Where one of two plaintiffs resides within and the other without the distance of twenty miles from the defendant, and the sum recovered is under 20*l.* in contract, and 5*l.* in tort, the case is one of concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95. *Bennett v. Benham*, 616.

And see **COSTS**, 4, 5.

CROYDON GAS COMPANY.—See **GAS COMPANY**.

CROYDON IMPROVEMENT ACT.

Construction of 10 G. 4, c. lxxviii, s. 27.—See **GAS COMPANY**.

DAMAGES.*Measure of.*

A. deposited a dock-warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock-warrant, and C. took actual possession of the brandies on the 30th:—Held, by Erle, C. J., Byles, J., and Keating, J., that the proper measure of damages was the actual damage A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal.

But by Williams, J., that the proper measure of damages was the value of the thing converted,—the bailment having been terminated by the wrongful sale. *Johnson v. Stear*, 330.

DEDICATION.

Of highway to the public.—See **NUISANCE**, 3, 4.

DEED.*Delivery of.*

1. A deed (which by arrangement was to be executed in duplicate, one to be prepared by each party and to be interchanged between them) was executed by the grantee, but not attested, and was by him sent to the solicitor of the grantors to procure their execution; and they accordingly signed, sealed, and delivered it:—Held, that this was a complete delivery, whereby the estate passed; and that the above arrangement did not render the deed an escrow until the duplicates were interchanged. *Kidner v. Keid*, 35.

Construction of.

2. By deed of 1857, A., who was tenant for life under the will of one S., conveyed (under a power) land to B. in fee, with a reservation out of the grant of "all and every the seam or seams of coal and other minerals under the said hereditaments hereby granted, with power to win, work, and carry away the same under or over any part of the said hereditaments and premises,—the said A., or the person or persons for the time being entitled thereto, and his or their assigns, paying to the said B., his heirs and assigns, compensation for any damage which he or they may sustain thereby," and a covenant by A. that he had not done or permitted any act or thing whereby the premises or the title thereto should or might be encumbered or prejudicially affected. And B. covenanted, for himself, his heirs and assigns, "that the said hereditaments and premises hereby conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible matter, or for the purpose of any offensive trade or business, the side walls to be not less than 18 feet high, and to be in uniformity with the street," &c. In 1844, S., A.'s testator, had demised to C. and D. "a colliery and coal-mines and seams of coal, as well opened as not opened" (including and comprising all seams of coal under the land conveyed by the deed of 1857), with full power to the lessees, their executors, administrators, and assigns, to win, work, and carry away the said seams of coal for a term of years not yet expired. The plaintiff became possessed of the land comprised in the deed of 1857, and built four houses thereon; and, whilst he was so possessed, the houses were injured by the working and carrying away by the assignees under the lease of 1844 of the seams of coal thereunder. He thereupon brought an action against A., claiming compensation under the reservation contained in the deed

DEED—(continued).

of 1857. The defendant (A.) pleaded seventhly,—as to so much of the count as related to the damage and injury done to the part of the said piece of ground on which the said houses were built, and to the said houses, and to the compensation claimed by the plaintiff in respect thereof,—that such damage and injury were occasioned by reason of the said houses having been erected thereon :—Held, that the compensation clause in the deed of 1857 extended to houses thereafter built upon the land, and consequently that the seventh plea was no answer to the declaration. *Berkley v. Shafte*, 79.

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EQUITABLE PLEA,—See **SET-OFF**.

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EXECUTION,—See **BANKRUPT**, 2.

EXECUTORS AND ADMINISTRATORS.

Right to sue.

The rule, that, in order to entitle a party to sue in any court of this country, whether of law or equity, in respect of the personal rights of a testator or intestate, he must appear to have obtained probate or letters of administration from the proper court here, is subject to this qualification, that he is suing in right of the deceased. *Vanquelin v. Boward*, 341.

FIRE INSURANCE,—See **INSURANCE**, 4.

FOREIGN JUDGMENT.

How enforced.

1. The first count of the declaration stated that one V., a French subject domiciled in France, drew certain bills at Orleans upon the defendant at Paris; that V. endorsed them to one B.; that, the bills being dishonoured, B. obtained judgment against the defendant and V. in an action thereon in the court of the Tribunal of Commerce of the department of the Seine, a court of competent jurisdiction in that behalf; that, according to the laws of France, in case V. satisfied the judgment, the defendant would become liable to pay V. the amount with interest, and V. would become entitled to the benefit of the judgment against the defendant, and would be substituted for B. in all his rights upon the same against the defendant, and entitled to enforce the same for his own benefit against the defendant; that afterwards and whilst the judgment was in full force and unsatisfied by either the defendant or V., the latter died in France, and the plaintiff, his widow, became, in accordance with the laws of France, "the donee of the universality of the real and personal estates belonging to the succession of V. at his death, and thereby, and according to the laws of the said empire, all rights, claims, and causes of action, and also all liabilities and obligations of V., vested in her personally and absolutely, and she became according to the said laws liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of V., and she was, according to the said laws, substituted for, and placed in the same position with respect to the defendant as regards the said bills and the said judgment thereon, to all intents and purposes as V. had been in his lifetime;" that, afterwards, the plaintiff was obliged to pay and did pay the amount of the said judgment and interest, and thereupon B. delivered to her the bills and the record of the judgment, and the plaintiff then became and was, according to the laws of France, entitled to the benefit of all the rights of B. upon the judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for B. in all his rights against the defendant in respect of the judgment, and the defendant

10) REIGN JUDGMENT.

How enforced (continued).

became indebted and liable to pay the plaintiff the amount so paid by her, with interest; that, the defendant having neglected to pay the moneys so due from him to the plaintiff, the latter, in order to keep alive the liability of the defendant, and to prevent the same from being barred by lapse of time, and also in order to give effect to and enforce her claim upon the said judgment, took proceedings in the Tribunal Civil of the First Instance of the department of the Seine, being a court of competent jurisdiction in that behalf, and, according to the practice and procedure of that court, on the 2d of April, 1892, by adjudication of the court, an injunction was made to the defendant, in the name of law and justice, to pay within twenty-four hours to the plaintiff certain sums for principal, interest, and expenses; that all conditions precedent, &c., had been complied with to entitle the plaintiff according to the laws of France to be paid those several sums; and that they remained unpaid:—Held, on demurrer to this count, that it sufficiently disclosed a right in the plaintiff to sue in respect of the cause of action therein mentioned in the French courts in her own name, and consequently that it was competent to her to maintain an action here in respect of the payment so made by her after her husband's death, without taking out letters of administration in this country. *Vanquelin v. Boward*, 341.

2. To this count the defendant pleaded that the bills were not drawn at Orleans, as alleged:—Held, bad. *Id.*

3. He further pleaded (11), that the sums alleged to be due by virtue of the said judgment and injunction, and under the circumstances mentioned in the count, would, according to the laws of France, form part of the succession of the deceased, and be assets in the hands of the plaintiff as such donee of the universality of the real and personal estates belonging to the succession of the deceased, to be administered, such donee being, according to the said laws, the representative of the deceased in France, and entitled to the said sums of money in her representative character, and not otherwise:—Held, a bad plea, upon the same ground that the count was held good. *Id.*

4. He further pleaded (12), that the judgment in the first count mentioned was a judgment by default for want of appearance by the defendant in the court of the Tribunal de Commerce, and by the law of France would become void as of course on an appearance being entered:—Held, bad; for that the possible contingency of the judgment of the foreign court being set aside there, is no answer to an action to enforce it here. *Id.*

5. He further pleaded (13), that the court of the Tribunal de Commerce was not a court of competent jurisdiction according to the French law, because the defendant was not a trader when he accepted the bills, and because the bills falsely purported to be drawn at Orleans, whereas they were not drawn there, nor was the drawer domiciled there at the time the bills were drawn:—Held, bad,—it sufficiently appearing that the Tribunal de Commerce had jurisdiction over the subject-matter of the suit, and that the matters alleged in the plea were matters which (if any defence) might and ought to have been set up by way of defence in that court. *Id.*

6. The second count stated, that certain bills of exchange were drawn upon the defendant by V., and accepted by him and dishonoured, that V. died, and the plaintiff was according to the laws of France "the donee of the universality of the personal and real estates belonging to the succession of V., and thereupon became entitled to all debts, claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner as they were vested in V., and the plaintiff was entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and she became entitled to sue the defendant thereupon in her own name and in her own right:—Held, good,—it sufficiently appearing that the plaintiff was entitled to sue upon the bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the laws of France rights different from those which an executor or administrator has in this country. *Id.*

7. For the same reasons, a plea (16) to the second count, that the plaintiff was not executor or administrator of V., deceased, was held bad. *Id.*

8. The 18th plea,—to both counts,—stated that V. and the defendant, in France, agreed to purchase for their joint benefit a debt due to one Q., and charged upon certain property in France; that it was agreed between them that V. should advance the purchase-money, and that the defendant should accept the bills in the declaration mentioned as a security to the deceased in case the debt should not realise the amount of the purchase-money; that, except as aforesaid, there never was any value or consideration for the acceptance of the bills; that V. recovered a large sum in respect of the said debt, and retained the same; and that the share thereof belonging to the defendant, and so retained

FOREIGN JUDGMENT.

How enforced (continued).

by V., was more than sufficient to satisfy the claim of V. in respect of the said judgment and bills:—Held, that this plea was a good answer to the claim in the second count amounting to an allegation that the bills were accommodation bills and that there was no value or consideration for their acceptance; but that it afforded no answer to the first count. *Vaquez v. Bouard*, 341.

9. That which constitutes a defence in the foreign court is not pleadable in an action upon the judgment in the courts of this country. *Jb.*

FORESHORE.

Right of bathing.

The powers conferred upon local commissioners or local boards of health under the 16 & 11 Vict. c. 34, 89, or under any special act, for regulating the mode of bathing on the sea-shore, and licensing bathing-machines there, do not warrant the licensees of such machines in placing them on any part of the foreshore which is private property. *Mees v. Philcox*, 600.

FREIGHT.—See MONEY PAID AND RECEIVED.

FRIENDLY SOCIETY.

Substity of members of contracts.

1. By the 17 & 18 Vict. c. 25, s. 1, it was provided that all actions against any society established under the Industrial and Provident Societies Act, 1852 (15 & 16 Vict. c. 41), shall be commenced and prosecuted against the registered officer of the society, or against the trustees where there is no registered officer. These acts were repealed by the 24 & 26 Vict. c. 87, the 6th section of which provides that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society: and all legal proceedings then pending by or against any such trustee or other officer on account of the society, may be prosecuted by or against the society in its registered name, without abatement."—Held, that the effect of such repeal was to render the members individually liable to be sued in respect of a contract made by the society prior to the passing of the repealing act, for which no action was then pending. *Dani v. Millard*, 19.

Substity for work done.

2. A benefit building society is bound by orders for necessary repairs given by the secretary, though not sanctioned by the number of trustees required by the rules for transacting the ordinary business of the company, or entered in the minute-book. *Allard v. Bourne*, 488.

GAMING.

Time bargains.

Money paid in respect of.—It is no answer to an action for money paid at the request of the defendant, to plead that the money was paid in respect of losses on time bargains for mining shares which the plaintiff had made as broker for the defendant with third persons. *Rees v. Billing*, 216.

GAS COMPANY.

Penalties for fouling streams.

By the Croydon Improvement Act, 10 G. 4, c. lxixll, s. 27, it is enacted, that, if the commissioners, or any company or other person making or supplying gas within the limits of the act, shall suffer any impure matter to flow into any stream, &c., they shall be liable to a penalty of 200l., to be sued for by any common informer, and to a further penalty of 20l. a day for the continuance of the nuisance after notice; to be paid to the informer or the party injured, as the justices should think fit. By the 21st section of the Gasworks Clauses Act, 1847 (10 Vict. c. 15), a like penalty is imposed upon the undertakers of any gasworks for the same offence, which penalty is, by s. 22, "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act:" and by s. 23, a daily penalty of 20l. is imposed on them for the continuance of the nuisance after notice, to be recovered in like manner:—Held, that a gas-company established under an act of parliament in which the provisions of the Gasworks Clauses Act are incorporated, are liable to the penalties imposed by the 10 Vict. c. 15, but not to those imposed by the 10 G. 4, c. lxixll. *Part v. The Croydon Improvement and Gas Supply Company*, 568.

GASWORKS CLAUSES ACT, 1847.

Construction of.—See GAS COMPANY.

GRATUITOUS BAILEE,—See RAILWAY COMPANY, 1.

HACKNEY CARRIAGE,—See NOTICE OF ACTION.

HASTINGS IMPROVEMENT ACT.

Construction of 2 & 3 W. 4, s. cxi.

The powers conferred upon local commissioners or local boards of health under the 10 & 11 Vict. c. 34, 89, or under any special act, for regulating the mode of bathing on the sea-shore, and licensing bathing-machines there, do not warrant the licensees of such machines in placing them on any part of the foreshore which is private property. *Mace v. Philcox*, 600.

HIGHWAY,—See NUISANCE, 3, 4, 5.

HORSE,—See WARRANTY.

HUSBAND AND WIFE.

Proof of marriage.

1. In order to sustain a plea of coverture, the defendant swore, that, in 1844, she was married to one J. L. at a Roman catholic chapel in London (both parties being Roman catholics); that the ceremony was performed by a priest, in the way in which Roman catholic marriages are ordinarily solemnized; that she cohabited with J. L. for several years, and until he went to Australia, where he now resided:—Held, that the court and jury might presume that the marriage was valid, though it was not proved either by oral testimony or by the certificate given by the priest on the occasion, that the place where the marriage was solemnized was licensed under the 6 & 7 W. 4, s. 85, s. 18, or that the registrar was present,—the contrary not appearing. *Sichel v. Lambert*, 781.

Liability of husband for goods supplied to the wife.

2. Where a wife is living with her husband, the presumption is, that she has his authority to bind him by her contract for articles suitable to that station which he permits her to assume: but that presumption may be rebutted by showing that she had not such authority. *Jolly v. Rees*, 628.

3. In 1851, the defendant forbade his wife to incur debts for clothing for herself and two daughters, telling her he would allow her 50*l.* a year for that purpose, in addition to 4*l.* per annum which was settled upon her to her separate use. In 1860 and 1861, the wife contracted a debt with the plaintiffs for clothing. The plaintiffs had no notice of the revocation of the wife's authority. In an action against the husband to recover the price of these goods, the jury found that the articles supplied were necessaries suitable to the estate and degree of the parties; that the wife's authority to pledge her husband's credit was revoked in 1851; that, if the 115*l.* per annum had been regularly paid to the wife, and applied by her to the clothing of herself and daughters, it would have been sufficient; that (beyond the 65*l.*) it was not regularly paid; and that so much of it as was paid was insufficient:—

Held, by Erie, C. J., Williams, J., and Willes, J., that the plaintiffs were not entitled to recover.

Held by Byles, J., that they were,—for that a private arrangement between husband and wife limiting her ordinary and apparent authority, without notice to the tradesman who has supplied necessaries to the wife, is no answer to an action by the tradesman against the husband. *Ib.*

Conveyances by married woman under 3 & 4 W. 4, s. 74, s. 91.

4. The court will not allow the wife of a lunatic to convey her separate estate, under the 3 & 4 W. 4, s. 74, s. 91, without some explanation as to the nature of the lunatic's property, and whether it contributes to the wife's support. *In re Cloud*, 833.

IMMATERIAL ALLEGATION,—See NEGLIGENCE.

INDUSTRIAL SOCIETY,—See FRIENDLY SOCIETY, 1.

INFANT.

Appearance by.

1. Although the Common Law Procedure Act, 1852, binds married women as to appearance to process, its provisions in that respect do not apply to infants. *Jarman v. Lucas*, 474.

2. An infant having been served with a writ of summons in an action for breach of promise of marriage, the plaintiff (as guardian having been appointed or appearance entered for the defendant) signed judgment and gave notice of inquiry, and proceeded to an assessment of damages:—The court set aside the judgment and all subsequent proceedings, for irregularity. *Ib.*

INFORMER,—See GAS COMPANY.

INJUNCTION.

Under the Common Law Procedure Act, 1854.

A railway company having conveyed to A. a piece of land abutting on their viaduct, with a covenant not to build within six feet of the wall of the viaduct,—the court, in an action against A.'s widow (who took by assignment) for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building; it appearing that it had been erected by her undertenant, and consequently that she could not obey the writ, if granted. *The London and South Western Railway Company v. Webb*, 450, 454.

INSPECTION OF DOCUMENTS,—See PRACTICE, 5.

INSURANCE.

Warranty of sea-worthiness.

1. Three steamers, the Bourdon, the Papin No. 1, and the Papin No. 6, which were intended for the navigation of the Danube, were insured "at and from Lyons to Galatz," with leave to call at all ports and places in the Mediterranean for all or any purpose, beginning the adventure at Lyons, &c., with a declaration that "it should be lawful for the said ships to proceed and sail to and touch and stay at any ports or places whatsoever, and with leave to tow and be towed, without being deemed any deviation," &c.,—*warranted to sail on or before the 15th of August, 1861.*

The Papin No. 6 left Lyons on the 24th of July, and arrived at Marseilles on the 30th. The Bourdon and Papin No. 1 left Lyons on the 2d of August, and arrived at Marseilles, the former on the 7th, the latter on the 8th. All three vessels were in a fit and proper state for the voyage down the Rhone to Marseilles, but, from the nature of the navigation, they could not, on leaving Lyons, be in a state of readiness,—as to masts and sails, chains and anchors, sea crew, &c.,—for the sea portion of the voyage to Galatz.

They all left Marseilles properly manned and equipped for the residue of the voyage on the 23d of August,—the intermediate time having been consumed in the sea-equipment, and in procuring the surveys and permit to depart required by the French law, which could only be obtained at Marseilles. This delay the jury found not to have been unreasonable:—

Held, that both the implied warranty of sea-worthiness, and the express warranty to sail on or before the 15th of August, were complied with. *Bouillon v. Lupton*, 113.

Delay in voyage.

2. As to the Papin No. 6, which arrived at Marseilles on the 30th of July, it appeared that she might have been got ready for sea several days earlier than she was, but that the captain deemed it prudent to detain her at Marseilles in order that all three vessels might depart in company. The jury having found that this was a reasonable cause of delay as to that vessel, the court refused to disturb their verdict. *Ib.*

"Particular Charges."

3. Bacon was insured from New York to Liverpool on a policy declaring it to be "warranted free from average, unless general, or the ship be stranded, sunk, or burnt." In the course of the voyage, the vessel encountered bad weather, and the master, for the preservation of the ship and cargo, put into Bermuda, where on survey the vessel was found to be so much damaged that she could only be repaired at an expense exceeding her value when repaired; and she was accordingly sold. Surveys were then held upon the cargo, in order to determine what should be sent on and what sold. Part of the bacon was found too much damaged for re-shipment, and was sold: the rest was re-shipped, and arrived partially damaged at Liverpool. The assured claimed against the underwriters the difference between the original freight and the increased freight on the portion so carried on, the warehouse-rent incurred at Bermuda, the expense of the surveys on the goods, and the coo-perage on those forwarded,—all which charges, except the coo-perage, it was admitted upon a case stated for the opinion of the court (who were to draw inferences) that down to the date of the policy in question it was the custom of underwriters to pay, under the name of "particular charges," upon policies in the same form:—Held, upon the authority of *The Great Indian Peninsular Railway Company v. Sanders*, 1 B. & Sm. 41, 2 B. & Sm. 286, that the underwriters were not liable for any of the above charges; and that the circumstance of the goods being of a perishable nature did not constitute any substantial distinction between the two cases. *Booth v. Gair*, 291.

Construction of fire-policy.

4. A fire policy was effected on a steamship, with her tackle, &c., "lying in the Victoria Docks, London, with liberty to go into dry-dock, and light the boiler-fires once or twice during the currency of this policy." Adjoining but not belonging to the Victoria Docks

INSURANCE.*Construction of fire-policy (continued).*

is a "pontoon" graving-dock. This being found of insufficient capacity to take in the vessel in question, she was towed for repair to a dry-dock about two miles higher up the river, for the purpose of going into which dock it was necessary to remove the lower half of her paddle-wheels. This was done in the Victoria Docks. Her repairs being (with the exception of some internal fittings) completed, the vessel was taken out of the dry-dock and moored in the river, where she remained ten days (found by the jury not to be an unreasonable time) for the purpose of having her paddle-wheels replaced. Whilst so moored, she was destroyed by an accidental fire:—Held, that the policy only attached upon the vessel whilst in the Victoria Docks, or in a dry-dock, or whilst going to and returning from a dry-dock, but not daring her stay in the river for a different purpose, and consequently that the insurers were not liable for the loss. *Pearson v. The Commercial Union Assurance Company*, 304.

INTERROGATORIES.—See PRACTICE, 6.**JOINT-STOCK COMPANY.***Liability of directors for contracts made by the secretary under their sanction.*

A prospectus of a projected company for the conveyance of emigrants to British Columbia contained statements calculated to induce intending emigrants to believe that arrangements had been perfected for the object in view, and inviting them to take tickets for their passage and the public to purchase shares. This prospectus was shown by the secretary to the defendants, and they were asked to allow their names to be inserted therein as directors; to which they consented, on being qualified (that is, presented each with 200 paid-up shares of the nominal value of 10*l.* each) and indemnified. Their names were accordingly inserted, and the prospectus published and advertised in the Times:—Held, that, from these facts, the jury were warranted in inferring that one who contracted with the secretary for a passage, and paid his money, upon the faith of the representations contained in the prospectus, did so upon the credit of the defendants, and consequently that he was entitled to sue them for a breach of such contract. *Collingwood v. Berkeley*, 145.

JUDGES' NOTES.*On moving for new trial.*

It is not necessary to have a copy of the judge's notes at the time of moving for a new trial in a case tried, under a judge's order, before a county court. *Morrison v. Woolley*, 457.

JUDGE'S ORDER.*Varying.*—See PRACTICE, 7.**LANDLORD AND TENANT.***Distress for rent.*

1. There is no illegality in distraining for rent by climbing over a fence, and so gaining access to the house by an open door. *Eldridge v. Stacey*, 468.
2. The broker having been forcibly expelled, regained possession by force after an interval of three weeks:—Held, that he was justified in so doing; and that it was a question for the jury whether by staying out so long he had abandoned the distress. *Id.*

LIBEL.*Privileged communication.*

1. *Interest or duty.* A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain crimimatory matter, which, without this privilege, would be slanderous and actionable. *Whiteley v. Adams*, 392.

2. A., a well-esteemed member of a congregation in London notorious for its extreme high-church notions, being on a visit to a Mrs. H. (also a member of the same congregation), who was residing for a time at S., in Berkshire, was by her introduced to B., the rector of the parish, a gentleman of similar religious tendencies. The latter introduced A. to one of his parishioners, a farmer named F., with whom A. soon became on terms of intimacy, staying on several occasions at F.'s farm with different members of his family. After the lapse of some months, F., conceiving that he had ground of complaint against A. with regard to some private transactions which he communicated to B., brought an action against A. for board and lodging and the price of a horse which he alleged had been bought of him by A. A. resisted the claim as to the board and lodging on the ground

LIBEL.*Privileged communication (continued).*

that he and his family had resided at F.'s farm as guests and not as lodgers, and the claim as to the horse on the ground that he had only taken it upon trial. In this state of things, one C., one of the curates of the London congregation, wrote to B. asking him to consent to act with him as arbitrator in the dispute between F. and A. B. declined; whereupon C. again wrote to him, urging it upon him as a sacred duty to aid in averting what he called a scandal from a member of his (C.'s) congregation. In reply to this letter, B. wrote to C. giving him his reasons for declining to act as arbitrator, imputing to A. very gross misconduct, and adding, "I think it my duty to unmask him to you." This letter having been handed by C. to A., and the latter having commenced an action for a libel against B., B. came to London, and called on Mrs. H., to whom he detailed some of the charges against A. That lady intimated her conviction that B. was mistaken in his opinion of A., but said she would see him on the subject and communicate with B. the result, adding that she was quite sure A. would tell her the truth. Mrs. H. afterwards wrote to B. (with A.'s knowledge), telling him that A. denied all the charges alleged against him, and reiterating her confidence in A.'s integrity. B. thereupon wrote in answer to Mrs. H. substantially repeating the charges, saying, as to one of them, that there was not a shadow of doubt but that the complaint was correct, and that if A. denied it in the witness-box he would be indicted for perjury. This letter was also handed to A. (who, knowing it was coming, called on Mrs. H. for it), and a second action was the result. The two actions having been consolidated, the jury at the trial found that the charges contained in the letters were unfounded, but that B. was not actuated by malice:—Held, that both letters were privileged, on the ground that they were written by the defendant in what he believed to be the honest discharge of a social and moral duty, and on a subject-matter in which the writer had an interest in making the communications, and the persons respectively receiving them had an interest in the receipt of them,—Byles, J., confirming his judgment, as to the second letter, to the latter ground. *Whiteley v. Adams*, 392.

3. On the recommendation of one E. (who was superintendent of the Horticultural Society's gardens, and in the habit of recommending gardeners to its members), K. hired F. in that capacity. Being dissatisfied with him after some months, he gave him notice to leave his service, and called upon E. to recommend him another gardener in his place. Shortly afterwards K. wrote to E. a letter, complaining of F.'s conduct; in which letter, amongst other things, he said,—"On Saturday I had another scene with F. in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and eyes starting from the sockets with rage, a perfect raving madman. I was, fortunately, accompanied by my upper servant. He accused me of having opened a letter of his, &c. I think it right that you should be informed of F.'s violent conduct, as you might unwittingly recommend him, without being aware of his temper and faults." In consequence of this letter, E. refused to employ F. in the society's gardens, as he before had done, and but for the letter would have done again:—Held, that, assuming that the relation between K. and E. was such as to warrant a communication on the subject of F.'s conduct, the above letter was excluded from the privilege, by reason of excess. *Fryer v. Kinnerley*, 422.

LICENSE.

Under Hackney Carriage Act.—See NOTICE OF ACTION.

LOCAL GOVERNMENT ACT, 1858.

Construction of 21 & 22 Vict. c. 98, s. 9.

The 72d section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), required certain notices to be given to the local board of health before the laying out, making, or building upon any new street. This provision is repealed by the Local Government Act, 1858 (21 & 22 Vict. c. 98), except (s. 9) as to "proceedings, matters, and things respectively begun or made" under any section of the former act:—*Seemle*, that, where the proper notice had been given and plans lodged under the Public Health Act, this was a "matter or thing begun or made," within s. 9 of the Local Government Act, although little or nothing appeared to have been done towards the formation of the streets of which notice had been given. *Falkia, app., Berridge, resp.*, 257.

LUNATIC.

Conveyance by wife of.—See HUSBAND AND WIFE, 4.

MANDAMUS.

Under the Common Law Procedure Act, 1852.—See ARBITRAMENT, 4.

MARKET.*Regulation of.*

1. The 62d section of the Barnsley Improvement Act, 3 G. 4, c. xxv., imposed a penalty for, amongst other things, exposing for sale in any of the streets, &c., of the town any meat, &c., so as to project over or upon any foot or carriageway, &c. The 63d section provided that no person should be subject to any penalty under the act for placing any stall or exposing provisions, &c., for sale, so as such stalls, &c., be placed in such part of the streets, &c., as should be appointed by the commissioners. And the 64th section provided that no person should be subject to any penalty under the act for placing any stall or exposing provisions, &c., for sale in such parts of the streets, &c., as should have been theretofore used for that purpose at the times of the usual fairs and markets within the town, &c. In the year 1853, a local board of health was constituted in Barnsley under the Public Health Act, 1853 (16 & 17 Vict. c. 24), who, by certain by-laws duly allowed and published, appointed certain places for markets for certain descriptions of goods on market-days, and imposed penalties for the breach thereof:—Held, that the provisions of the local act did not exempt from such penalties one who violated these by-laws by exposing for sale meat, &c., at a place other than that so appointed by the local board of health, —notwithstanding the spot where such meat, &c., was so exposed for sale was a place where such articles had for a long series of years been sold by him and others. *Savage, app., Brook, resp.*, 264.

Disturbance of rights in, and removal of.

2. From time immemorial, until lately, a weekly market had been held in the High Street of Bridgnorth. The market belonged to the corporation of Bridgnorth, who were also lords of the manor in which the borough is situate. The plaintiff was the owner of a house in the High Street; and he and the previous owners and occupiers of that house, as well as several other occupiers of houses in High Street, had from time immemorial erected, on market-days, stalls opposite their respective houses, and had exposed thereon goods for sale in the market, or let the stalls for hire to others who had done so: and no payment had ever been made to or claimed by the corporation for stallage or for tolls of things sold at such stalls, though they took tolls of similar produce exposed elsewhere in the market. The corporation removed the market to another place within the borough, at a small distance from the High Street, and so necessarily injuriously affected the interests of those who had rights in the old market:—Held, that the plaintiff was entitled to maintain an action for the unlawful disturbances by the corporation of his enjoyment of this right,—which was probably conferred in consideration that the holding of the market must necessarily diminish on market-days the trade and custom of the shops kept in such houses, and the shopkeepers were therefore privileged to advance, as it were, their shops into the market itself by having stalls in the street commensurate with the fronts of their houses, and consequently that the enjoyment of the stalls by the owners and occupiers of the houses, and those licensed by them, was sufficiently connected with the enjoyment of the houses to satisfy the rule acted upon in *Ackroyd v. Smith*, 10 C. B. 164, and *Bailey v. Stephens*, 12 C. B. N. S. 91, that no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof. *Ellis v. The Mayor, &c., of Bridgnorth*, 52.

3. Held also, that the removal of the market was not justifiable under the Public Health Act, 1848 (11 & 12 Vict. c. 63), or the Local Government Act, 1858 (21 & 22 Vict. c. 98), inasmuch as the power to provide market-places conferred upon the local board by the 50th section of the last-mentioned act, is expressly qualified by the proviso that no market shall be established so as to interfere with any rights enjoyed by any person, without his consent. *Ib.*

MARRIAGE.

Proof of.—See HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

Authority of servant to warrant a horse.

In an action for the breach of a warranty on the sale of a horse by the servant of a private owner at a fair,—Held, that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty and averring a breach of it, and an answer from the defendant simply denying that there had been any breach of warranty, afforded evidence whence the jury were justified in finding that the servant had authority in fact to warrant. *Miller v. Lawton*, 834.

MEASURE OF DAMAGES.—See DAMAGES.

MEMORANDA.

Judges.

- Death of Cresswell, J., 1.
- Wightman, J., 581.
- Promotion of Wilde, J., 1.
- Appointment of Pigott, B., 2.
- Shree, J., 581.

Attorney and Solicitor-General.

- Resignation of Atherton, A. G., 2.
- Promotion of Palmer, S. G., 2.
- Appointment of Collier, S. G., 2.

Queen's Counsel.

- Cooke, Gray, Powell, Loch, 2.

Patent of Precedence.

- Ballantine, Serjt., 581.

MINE.

Rights of adjoining mine-owners.

The owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner for the purpose of getting out the minerals in any part of his mine; and he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted. But he has no right by pumping or otherwise to be an active agent in sending water from his mine into the adjoining mine. *Baird v. Williamson*, 376.

Compensation for damage in working,—See DEED, 2.

And see COAL-MINES.

MISTAKE OF FACT,—See MONEY HAD AND RECEIVED.

MONEY HAD AND RECEIVED.

Money paid under mistake of fact.

Certain bales of cotton were consigned by merchants at Madras to London for the account of their correspondents, the plaintiffs, who were merchants at Liverpool, under bills of lading having in the margin, pursuant to the course of business at Madras, a note of the measurement and the amount of freight. On the ship's arrival, the plaintiffs' brokers sent the cotton to a wharf with a copy of the bills of lading, another copy of the bills of lading being forwarded to the plaintiffs. According to the ordinary practice, the wharfinger, on receiving the cotton, measured it, and sent a note of the measurement to the defendants, who were the ship's brokers (*one of them also being the owner*). The defendants as brokers made out a freight-note, adopting the measurement from the wharfinger's note, which in consequence of the swelling of the bales on the voyage was considerably more than the Madras measurement in the margin of the bills of lading. The freight-note so made out was sent by the defendants to the plaintiffs' brokers, who, assuming it to be correct, paid the amount, and received credit for it in their account with their principals; and the defendants settled the ship's accounts upon the supposition that all was right. The plaintiffs, on balancing their accounts with the Madras house at the end of the following year, discovered for the first time that they had overpaid the defendants to the extent of 88*l.* 8*s.* 3*d.*, and brought an action to recover it back:—Held, that, the money having been paid under a mistake of fact, the plaintiffs were entitled to recover it back from the owner of the ship, but not as against the two defendants as ship's brokers, who had settled accounts with the owner in the bona fide belief that the payment had been rightly made. *Shand v. Grant*, 324.

MONEY PAID,—See GAMING.

NAVIGABLE RIVER.

Nuisance in,—See NUISANCE, 1.

NEGLIGENCE.

In navigating vessels.

The declaration stated that the plaintiffs were possessed of a telegraphic-cable for the transmission of messages between Dover and Calais by means of electricity, part of which cable was by charter of the Crown lying at the bottom of the sea within three marine miles of the shore; that the defendants were possessed of a certain ship on the high seas, and so carelessly navigated the same that their anchor fouled and injured the cable. Plea, that the telegraphic-cable was lying in the high seas more than three marine miles from the shore, and out of and beyond the realm, dominion, sovereignty, and jurisdiction of the

NEGLIGENCE.*In navigating vessels (continued).*

Queen; that the defendants were Swedes, and the vessel a Swedish vessel; that, in the usual and ordinary course of navigation, she was proceeding on a voyage from Spain to a port in Sweden, and in the usual and ordinary course of navigation cast anchor; that, without any default of the defendants, the anchor dragged, and in being raised became entangled with and injured the telegraphic-cable; that there was no buoy or mark to show the spot in which the telegraphic-cable was lying, and that its position and existence were wholly unknown to the defendants and those having the management and direction of the vessel and anchor. Second replication, that the defendants could and ought to have known, and had the means of knowing, and but for their negligence and want of ordinary care would have known, the position and existence of the telegraphic-cable, and that it was through the carelessness, negligence, and want of ordinary or any care that they did not and would not know or use the means of knowing of its position and existence; that the anchor was not cast, got up, dragged, or entangled in the due course of navigation, as alleged, but contrary to the due course of navigation; and that the defendants, by their mariners and servants, with such means of knowledge, and with a culpable and unlawful omission to use the said means of knowledge, and out of and contrary to the due course of navigation, by and through the carelessness, mismanagement, and culpable want of knowledge of the defendants and their mariners and servants, committed the grievances in the declaration mentioned. Third replication,—as to so much of the plea as alleged the grievances complained of to have been committed out of the realm, dominion, sovereignty, and jurisdiction of the Queen,—that one end of the said telegraphic-cable was fastened to the soil of the county of Kent, and that the said grievances were committed within three miles of the shore, and not more than three miles from the shore, as in the plea alleged. New-assignment (as to part of the plea), that the plaintiffs sued, not only for causes of action in the plea admitted, but also for causes of action committed within three miles of the shore; and also for that, after the servants and mariners of the defendants were informed and had express notice of and knew the position and existence of the telegraphic-cable, and were warned and cautioned that they would injure the same, the defendants, through the carelessness and negligence of themselves and their mariners and servants in that behalf, and contrary to their duty in that behalf, so negligently and improperly, and without using due or ordinary or any care, and with more force and violence than was necessary, disentangled the anchor and cable of the defendants from the telegraphic-cable with such carelessness and negligence that by means thereof the same was injured as in the declaration mentioned:—Held, on demurrer,—that the declaration was good, by reason of the imputation of negligence; that the plea was good, as an argumentative traverse of the negligence charged in the declaration; that the second replication was a good traverse of the plea; that the third replication was bad, inasmuch as it traversed an immaterial allegation in the plea; and that the new-assignment was good. *The Submarine Telegraph Company v. Dickson*, 159.

NEW-ASSIGNMENT.—See NEGLIGENCE.**NEW TRIAL.**

It is not necessary to have a copy of the judge's notes at the time of moving for a new trial in a case tried, under a judge's order, before a county court. *Morrison v. Woolley*, 457.

NOTICE OF ACTION.*For an act done under the authority of a statute.*

1. To entitle a defendant to notice of action under a statute, he must honestly intend to put the law in motion, and really believe in the existence of a state of facts which if they existed, would have justified him in doing as he did. *Heath v. Brewer*, 803.

2. The 24th section of the Hackney Carriage Act, 6 & 7 Vict. c. 86, empowers the proprietor of a cab, if he has any complaint against his driver, to summon him before a magistrate, who may endorse the nature of the offence on his license: and the 47th section provides that a notice of action shall be given where a party is sued for "anything done under the authority of the act:—Held, that a cab-proprietor who, without summoning the driver before a magistrate, defaced his license by writing on it that he had been dismissed for damaging his cab and bringing home no money, was not entitled to a notice of action, inasmuch as he could not have honestly intended to put the law in motion or really believe that he was acting under the authority of the statute. *Id.*

NOTTINGHAM CANAL COMPANY.—See CANAL ACT.

NUISANCE.

In a navigable river.

1. One who erects or keeps erected on the shore of a navigable river between high and low-water mark a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction or from want of repair, presents a dangerous (hidden) obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge of it. *White v. Phillips*, 245.

2. The defendants were possessed of a wharf abutting on the river Thames, the soil in front of which was for the more convenient access thereto excavated by their predecessor, who placed there a campshed, a structure of piles and planks to keep up the adjoining soil. This campshed was originally improperly constructed, and was suffered to be out of repair. A barge of the plaintiffs was brought to the wharf for the purpose of receiving goods by means of the wharf crane from a schooner which was moored alongside and was discharging her cargo at the wharf, and those in charge of her, not being aware of the existence or the condition of the campshed, so moored the barge, that, on the tide receding, she came upon one of the piles, which forced a hole in her bottom, and the barge and its contents were damaged:—Held, that these facts disclosed a duty in the defendants to keep the campshed in repair or give notice of the danger, and a breach of that duty for which they were responsible in damages; and that it was immaterial whether or not the plaintiffs paid for the use of the wharf or the crane. *Id.*

Adjoining a highway:

3. If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way,—as, a flight of steps, or a projecting flap,—no action can be maintained against the person dedicating it for an injury caused thereby. *Robbins v. Jones*, 221.

4. Nor will an action lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication of the highway, and was dedicated to the public before the last General Highway Act, for an injury to an individual from the giving way of the covering of the area in consequence of the wear and tear occasioned by public user. *Id.*

5. In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses and this road was a space which was covered over (as a means of access to the houses) by a flagging in which were gratings to let light and air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level at the rear. The space so covered had become, by dedication prior to the General Highway Act, 5 & 6 W. 4, c. 50, a part of the public footway, and was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging and grating in front of one of the houses (having become weakened by user) gave way, and several persons were precipitated into the area below (a depth of about thirty feet), and one of them was killed:—Held,—in an action by the widow of the deceased, under Lord Campbell's Act, 9 & 10 Vict. c. 93,—that, there being under the circumstances no legal liability on the lessee of the houses to keep the surface of this way in repair, the action was not maintainable,—the gulph at the side of the causeway being the result of the road being raised by the makers of it, not by the land at the side being excavated by the proprietors of it: and that the artificial character of the flagging and grating did not make it more or less a way to be repaired by the parish. *Id.*

6. A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening in consequence during the term. *Id.*

And see **GAS COMPANY**.

OBITUARY,—See **MEMORANDA**.

OFFICIAL ASSIGNEE.

Liability of, for contribution to costs of an action.—See **BANKRUPT**, 3.

PAPER-BOOKS.

Delivery of,—See **PRACTICE**, 2.

PARTICULAR CHARGES,—See **INSURANCE**, 3.

PARTNERSHIP.

When constituted.

A, B, and C, agreed that each should furnish 300*l.* worth of goods to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments:—Held, that this did not constitute a partnership between the three, so as to make

PARTNERSHIP.*What constitutes (continued).*

B. and C. responsible for goods bought by A. to furnish his quota of the cargo. *Heap v. Dobson*, 460.

[PATRON.

The right of a patron to present to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, and to reject him for sufficient ground. *Bishop of Exeter v. Marshall* (H. of L.), 857.]

PAWN,—See **CONVERSION**.

PLEDGE.

Power of sale, on default,—See **CONVERSION**.

POWER OF SALE,—See **CONVERSION**.

PRACTICE.

Pleading several matters.

1. A., assuming to be the owner of land over which eight other persons claimed right's of common, enclosed it. In order to assert their claim, the eight signed a document professing to authorise each other, and B. and C. as agents for all and each of them, to enter upon the land and remove the fences, which B. & C. accordingly did. Separate actions having been brought against the eight for this trespass,—each was allowed to plead several pleas justifying under the titles of the other seven, as well as under his own title. *Church v. Wright*, 750.

Delivery of paper-books.

2. The only proper place for the delivery of paper-books, is, the judges' Chambers, the Serjeants' Inn. *Howells*, app., Wynne, resp., 11.

Discovery and inspection of documents.

3. An application for a discovery of documents under the 50th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), must be made upon the affidavit of the party to the cause. *Christopherson v. Lotinga*, 809.

4. *Herschfeld v. Clarke*, 11 Exch. 712, confirmed. *Id.*

5. Upon a motion for an inspection of the plaintiffs' books, which the defendant alleged to be necessary for the purpose of establishing a set-off in respect of commission which he claimed on sales effected by the plaintiffs through his introduction,—The court granted the rule, although the plaintiffs swore that there was no agreement to allow the defendant any commission: but held that the plaintiffs were entitled to seal up all those parts of the books which they pledged their oath that the defendant had no interest in. *Bull v. Clarke*, 851.

Interrogatories under 17 & 18 Vict. c. 125, s. 51.

6. It is no objection to interrogatories under the 51st section of the Common Law Procedure Act, 1854, that the answers, if given in the affirmative, will show that the execution of a deed upon which the defence is founded was obtained by fraud. *Goodman v. Holroyd*, 839.

Varying Judge's order.

7. The defendant's goods having been taken under a *f. fa.* after the debt and costs had been paid by another party liable upon the same instrument, he applied to a judge to set aside the execution. The judge made the order, but imposed as a term that the defendant should bring no action. Having availed himself of the order so as to get the sheriff to withdraw from possession,—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action. *Wilcoz v. Odden*, 837.

At Chambers.

8. *Affidavit*.]—Upon a motion for costs under the 15 & 16 Vict. c. 54, s. 4, after an unsuccessful application to a judge at Chambers, the plaintiff must bring before the court all relevant materials which were used before the judge. *Bennett v. Benham*, 616.

PRINCIPAL AND AGENT.

Agent's right to commission.

A., a clerical agent, was employed to sell an advowson for B. upon the terms contained in a circular in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been arrived at, or any particulars had been given by, or any communication whatsoever had been made from A.'s office, however and by whomsoever the negotiation might have been conducted, and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in conse-

PRINCIPAL AND AGENT.

Agent's right to commission (continued).

quence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that *no accommodation that might be afforded as to time of payment or advance should retard the payment of commission.* A contract of sale having been arranged through A.'s agency, and duly executed, and a deposit paid on the 14th of October, 1862, the residue of the purchase-money being payable on the 31st of December,—Held, that A. was entitled to his commission at all events on the 31st of December, although the full purchase-money had not, for some unexplained reason, then been paid. *Lara v. Hill*, 45.

PRINCIPAL AND SURETY.

Liability of surety.

1. The defendant executed a bond as surety to an insurance company for the fidelity of A., who was appointed an agent of the company at Adelaide, and who was about to and afterwards did enter into partnership (as merchants) with B., also an agent of the company at that place. The condition of the bond was, that, if A., his heirs, executors, &c., should well and truly pay and account for all moneys received by him, the obligation should be void:—Held, that the defendant was not responsible under this bond for moneys received by the firm of A. & B., notwithstanding he was aware at the time he signed the bond that A. was about to become partner with B. *Montefiore v. Lloyd*, 203.

2. Held, also, that the surrounding or "co-existing" circumstances were admissible for the purpose of explaining what might be ambiguous in the condition. *Ib.*

PRIVILEGED COMMUNICATION, —See LIBEL. SLANDER.

PROFIT A PRENDRE.

What amounts to a grant of.

A. agreed with B., that B. might dig and carry away cinders from a certain cinder-tip, the property of A., B. paying A. a certain price per ton:—Held, that this agreement need not be by deed. *Smart v. Jones*, 717.

PROMOTIONS, —See MEMORANDA.

PROVIDENT SOCIETY, —See FRIENDLY SOCIETY, 1.

PUBLIC COMPANY, —See JOINT-STOCK COMPANY. RAILWAY COMPANY.

PUBLIC HEALTH ACT, —See LOCAL GOVERNMENT ACT, 1858.

[QUARE IMPEDIT.

1. In *quare impedit*, upon a rejection of the patron's presentee, the bishop's plea must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manner as will enable the patron to take issue on the objection, and a proper tribunal to judge of its soundness. *Bishop of Exeter v. Marshall* (H. of L.), 857.

2. An allegation in the plea that the bishop had good reason to believe that the presentee had been guilty of an attempt to commit simony is not sufficient:—*Seemle*, that a plea alleging presentation by the bishop as on a lapse must allege notice to the patron of the circumstances under which the bishop would so claim to present. *Ib.*]

QUEEN'S PRISON ACT.

Judgment of the Common Pleas in *Gore v. Grey*, 13 C. B. N. S. 138, affirmed. *Gore v. Grey*, 567.

RAILWAY COMPANY.

Conditions on which goods carried by.

1. Any condition limiting the liability of a railway company as carriers must be a condition just and reasonable in the judgment of the court, and must be set out in a written (or printed) contract signed by or on behalf of the consignor of the goods. *Aldridge v. The Great Western Railway Company*, 582.

2. Certain packages called "empties" were delivered to a railway company to be carried to a place beyond their line, the person by whom they were delivered signing on the consignor's behalf a printed note containing the following among other conditions:—
"1. The company will not be answerable for the loss or detention of, or damage to, wrappers or packages of any description charged by the company as 'empties.' 2. Nor in respect of goods destined for places beyond the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money

RAILWAY COMPANY.

Conditions on which goods carried by (continued).

which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the ether carrier. 3. The company will not be liable for any loss of or injury to articles, except on proof that such loss or injury was occasioned by the neglect or default of the company or its servants." The goods were carried duly to Gloucester, where the defendants' line ended, and were there handed over to the Midland Railway Company in further prosecution of the transit, after which the detention and damage of which the plaintiff complained took place:—Held, that the second of the above conditions discharged the defendants from liability in respect of the damage and detention complained of. *Aldridge v. The Great Western Railway Company*, 582.

3. Held, also, that a signature of the special contract by a "railway agent" employed by the consignor to deliver and by the company to receive the goods for them, is a sufficient signature to satisfy the 7th section of the Railway Traffic Act, 1854. *Ib.*

4. *Seemle*, that the company were not to be considered as mere gratuitous bailees because the "empties" are carried free of charge,—the contract for payment for the same packages when forwarded *full*, including a contract or engagement on their part to make no additional charge for returning them when empty. *Ib.*

Motion under the Railway Traffic Act, 1854.

5. There is no obligation on a railway company, whether at common law or under the Railway Traffic Act, 1854, to carry goods otherwise than according to their professed. *In re Oxlade and the North Eastern Railway Company*, 680.

6. Therefore, it is competent to them to restrict their coal traffic to the carriage of coals for colliery-owners, from the pit's mouth to stations where such colliery-owners have cells or depots appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal-merchants,—such an arrangement being essential to the regulation of the large traffic in that article, and the company not being "common carriers" of coal. *Aldridge v. The Great Western Railway Company*, 582.

7. *Re Oxlade*, 1 C. B. N. S. 464, confirmed. *Ib.*

RAILWAY TRAFFIC ACT.—See **RAILWAY COMPANY**, 3, 5, 6, 7.

REGISTRAR IN BANKRUPTCY.—See **BANKRUPT**, 6.

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REVOCATION.

Of wife's authority to charge her husband for necessaries.—See **HUSBAND AND WIFE**, 2.

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SET-OFF.

Of unliquidated damages.

In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt,—the court allowed the defendant to plead an equitable plea of set-off for unliquidated damages arising out of the same contract. *Makeham v. Cron*, 847.

SHIPPING.

Owner's right to freight, though cargo damaged.

1. It is no answer to an action by a ship-owner against the charterer to recover freight, that, by the fault of the master and crew, and their negligent and unskilful navigation of the vessel, the cargo (coal) was damaged so as upon arrival at the port of discharge to be then there of less value than the freight, and that the charterer abandoned it to the ship-owner. *Dakin v. Oxley*, 646.

Liability of co-owners.

2. The ship's husband, or managing owner, is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight. *Barker v. Hignley*, 27.

3. Where, therefore, the ship's husband and managing owner ceased a bail-bond to be

SHIPPING.*Liability of co-owners (continued).*

given in the Admiralty Court, in the names of his co-owner and himself, in a suit for a collision, and the suit terminated in favour of the plaintiff, and the bail were called upon to pay damages, interest, and costs:—Held, that the co-owner was responsible to the bail for the money so paid. *Barker v. Higgley*, 27.

Construction of charter-party.

4. By a charter-party the charterer bound himself to load at Havana "a full and complete cargo of sugar and other lawful produce." Certain goods were enumerated, including timber, and certain rates of freight were mentioned; and the charter-party proceeded, "other goods, if any should be shipped, to pay in proportion to the foregoing rates, *except what might be shipped for broken stowage, which should pay as customary*" (half freight). A full cargo of mahogany logs was shipped, but no broken stowage was supplied to fill up the interstices, and the vessel was obliged in consequence to retain thirty tons of ballast:—Held, that, it being impossible to ship a "full and complete cargo," without broken stowage, the charterer was bound by his contract to furnish it. *Oble v. Meek*, 796.

Bill of lading.

5. *Contract in.*—By a bill of lading the vessel was to be unloaded in regular turn:—Held, that the *consignor* was liable for her detention beyond her regular turn, although there was no express contract for demurrage in the bill of lading. *Cawthron v. Trickett*, 754.

6. *Master's right to sue on.*—Held also, that, where the master was part-owner, but had the entire control and management of the ship, paying his co-owner a third of the net profits, it was competent to him to sue in his own name. *Ib.*

And see MONEY HAD AND RECEIVED.

SLANDER.*Privileged communication.*

1. A., suspecting B. of stealing meat from his shop, accused her of having done so (she one being by at the time). B. thereupon applied to a police-magistrate for a summons against A. A. meeting a third person, who was in the shop at the time the supposed larceny was committed, told him that proceedings had been taken against him, and said to him,—"You were in the shop: did not you see her take it?"—Held, a privileged communication. *Forbes v. Warren*, 806.

2. A. having accused B. of stealing meat, a friend of the latter, to whom she had mentioned the fact, called at A.'s shop, and asked him if he had accused B. of stealing, to which A. answered,—"Yes; and I believe it to be true."—Held, not a privileged communication. *Ib.*

STREAMS.

Fouling.—See GAS COMPANY.

STREETS.

Laying out.—See LOCAL GOVERNMENT ACT, 1858.

SURETY.—See PRINCIPAL AND SURETY.**TELEGRAPHIC-CABLE.**—See NEGLIGENCE.**TIME-BARGAINS.**—See GAMING.**TROVER.**—See CONVERSION.**UNLIQUIDATED DAMAGES.**—See SET-OFF.**VENUE.***Changing.*

Twenty-five witnesses and a horse on one side against ten witnesses on the other,—Held not such a preponderance of "inconvenience" as to induce the court to bring back the venue from the place where the cause of action (if any) arose. *Blackman v. Bainton*, 432.

WAGERING.—See GAMING.**WAIVER.**

Of irregularity.—See ARBITRAMENT, 1, 3. .

WARRANTY.

Of sea-worthiness,—See INSURANCE, 1.

On sale of a horse.

In an action for the breach of a warranty on the sale of a horse by the servant of a private owner at a fair,—Held, that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty and averring a breach of it, and an answer from the defendant simply denying that there had been any breach of warranty, afforded evidence whence the jury were justified in finding that the servant had authority in fact to warrant. *Miller v. Lawton, 834.*

WITNESS.

Examination on interrogatories.

In an action of slander, the defendant having obtained an order for the examination of two witnesses (whose names were given) in Australia,—the court, upon a motion to rescind the order, imposed as a term that the defendant should state what it was that he expected the witnesses to prove. *Barry v. Barclay, 849.*

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JOINT-STOCK COMPANY.

Members of.

The members of a joint-stock company registered provisionally under the 7 & 8 Vict. c. 110, s. 58, who by the terms of the deed of settlement have only a right to a share of profits,—the real estate of the company being vested in trustees, and the management in a committee,—have no such equitable interest in land as to entitle them to be registered. *Bennett, app., Blain, resp., 518.*

LIST OF VOTERS.

Where more than one.

1. Where there are two lists of voters for a borough, the notice of objection should distinctly state on which the objector's name appears. *Crowther, app., Bradney, resp., 536.*
2. The parish of K. consists of the borough of K., the foreign of K., and the hamlet of L. M. (which latter is not within the parliamentary borough),—for each of which separate overseers are appointed and separate rates are made. Two lists of persons entitled to vote in K. are made out,—one, of persons so entitled in respect of property occupied within the borough of K.; the other, of persons so entitled in respect of property occupied within the foreign of the parish of K.—the former is signed by the overseers of the borough, the latter by the overseers of the foreign:—Held, that a notice of objection signed "G. B., on the list of persons entitled to vote in the election of members for the borough of K., in respect of property occupied within the parish of K.," was insufficient. *Id.*

NOTICE OF CLAIM,—See OVERSEER.

NOTICE OF OBJECTION.

Form of.

1. The notice of objection given to a county voter was as follows:—"To Mr. Sidney Rice Force. I hereby give you notice that I object to the name of Force, Sidney Rice, being retained on the list," &c.,—inserting the name of the party instead of the pronoun "your," which is in the form No. 11, Sched. B. (6 & 7 Vict. c. 18):—Held, a sufficient compliance with s. 17. *Force, app., Floud, resp., 543.*

2. Held also, that, if necessary, this was an inaccuracy of description which was amendable under s. 101. *Id.*

And see LIST OF VOTERS.

OVERSEER.

Service of notice upon assistant-overseer.

One Y. was on the 21st of April, 1859, duly elected by the vestry assistant-overseer of the parish of A. (which is co-extensive with the borough), at a salary of 18*l.* 5*s.* per annum, and his election was duly confirmed by an appointment of justices on the 30th of August. In March, 1861, Y. gave notice to the guardians of his "intention to resign," but he subsequently withdrew it; and on the 26th of that month it was resolved at a vestry meeting that his salary should be increased to 30*l.* There was no confirmation of this increase of salary by the justices, or any new appointment of Y. by them. He, however, continued as before to perform all the duties of the office of assistant overseer:—Held, that service upon Y. of a notice of claim under the 30th section of the Reform Act was a good service. *Gunter, app., Addams, resp., 612.*

PART OF HOUSE.—See **QUALIFICATION OF VOTER**, 5, 6.

QUALIFICATION OF VOTER.

Freehold estate.

1. A. was a member of a freehold land and building society, in which he held one share. The society some years since advanced for him the purchase-money (73*l.*) for a piece of land, the annual value of which, for building purposes, was 3*l.*; and A. mortgaged it to the society to secure the monthly payments due upon his share, amounting annually to 4*l.* Before the 31st of January, A. had paid monthly instalments to the amount of 71*l.* Upon these facts, the revising-barrister found that A. had prior to the 31st of January, a freehold estate of the value of 40*s.* per annum (above all charges), and retained his name on the list of voters:—Held, that his decision was right. *Robinson, app., Dunkley, resp., 473.*

2. Remarks upon the case of Copland, app., Bartlett, resp., 6 C. B. 13, 2 Lutz. Reg. Cas. 183. *Id.*

Receipt of alms, within 2 W. 4, c. 45, s. 36.

3. Freemen of the borough of Sandwich, entitled as such to be registered, are not disqualified, as recipients of alms within the 36th section of the 2 W. 4, c. 45, by reason of their being members or brethren of the hospitals of St. Bartholomew and St. John in that borough, which hospitals are by repute corporations by prescription, having property consisting of landed estates and houses,—the income arising from the former being distributable annually (by the charity trustees, in whom the appointment to vacancies is vested), in equal proportions among the brethren, to each of whom is assigned a house to live in, which is to be kept in repair by him,—the possession of the houses and the receipt of the share of the revenues by them being matter of right, and not of an eleemosynary character. *Smith, app., Hall, resp., 485.*

Quasi copyhold tenure.

4. A. and others claimed to be entitled to vote in respect of property described in the list as "copyhold houses." Their estates were not in the strict sense of the term "copyholds;" but, from the statement of the case by the revising-barrister, they appeared to have some of the incidents of copyhold tenures, and they were plainly not freeholds, nor were they tenancies from year to year. The revising-barrister found "that the said A. (and the others) was seised in law or equity of houses of copyhold or other tenure not freehold, for his own life or for a larger estate;" and he retained their names on the list. The court affirmed his decision. *Gardner, app., Trevor, resp., 550.*

Part of a house.

5. The occupation of "part of a house" may confer a right to vote for a city or borough, under the 2 W. 4, c. 45, s. 27, if there be independent occupation and actual severance from the rest. *Honrothe, app., Booth, resp., 300.*

6. A. occupied the upper floor of a house, consisting of two rooms, an inner and an outer room, opening the one into the other, and communicating with the landing on the staircase by one outer door, over which A. had exclusive control. The rooms below were occupied by other tenants, and all had access to their several holdings from the street through a doorway at the entrance of a passage leading to the common staircase. At this entrance was a door open all day, but generally, but not invariably, allowed to swing to at night, but having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street:—Held, that the subject of occupation was a "house" within the meaning of the 27th section of the Reform Act. *Id.*

SEVERANCE.—See **QUALIFICATION OF VOTER**, 5, 6.

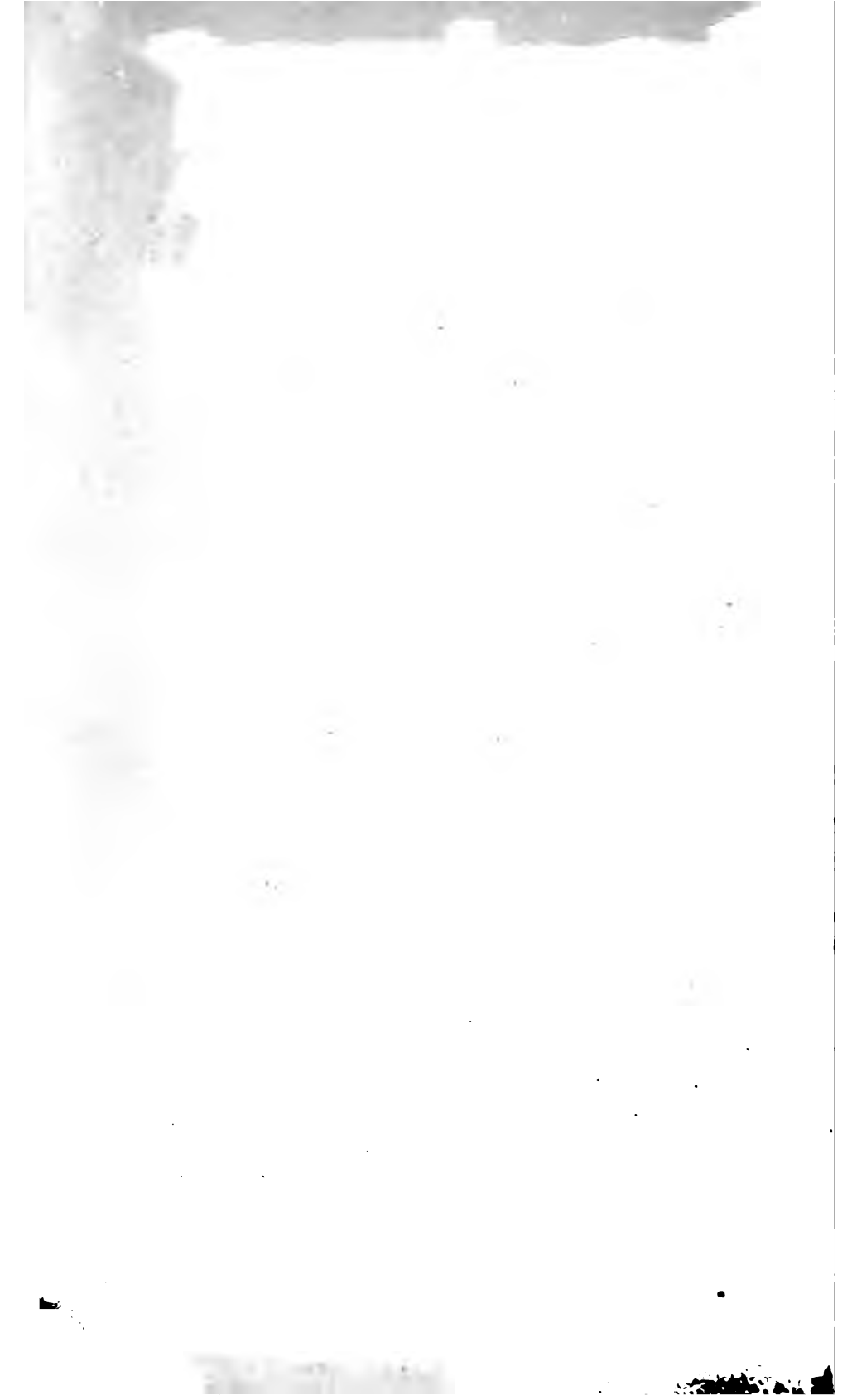












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